UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

4-3-2013

Pocatello Hospital v. Quail Ridge Medical Investors Clerk's Record v. 3 Dckt. 40566

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Pocatello Hospital v. Quail Ridge Medical Investors Clerk's Record v. 3 Dckt. 40566" (2013). *Idaho Supreme Court Records & Briefs*. 4529.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4529

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,	)	
Plaintiff-Respondent,	)	Supreme Court No. 41589
v.	)	
QUAIL RIDGE MEDICAL INVESTORS, LLC, AND FORREST L. PRESTON, an Individual	)	
Defendants-Appellants,	)	

CLERK'S RECORD

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock.

Before **HONORABLE Robert C. Naftz** District Judge.

For Appellant:

Michael D. Gaffney
John M. Avondet
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

For Respondent:

Dave R. Gallafent
R. William Hancock
Merrill & Merrill, Chartered
P.O. Box 991
Pocatello, Idaho 83204-0991

Pocatello Hospital, LLC, Portneuf Medical Center LLC vs. Quail Ridge Medical Investors, Llc, Forrest Preston

Date	Code	User		Judge
12/13/2012	LOCT	MARLEA	Clerk's	Robert C Naftz
	NCOC	MARLEA	New Case Filed-Other Claims	Robert C Naftz
	COMP	MARLEA	Complaint Filed	Robert C Naftz
	SMIS	MARLEA	Summons Issued	Robert C Naftz
		MARLEA	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: merrill and merrill Receipt number: 0042941 Dated: 12/13/2012 Amount: $96.00 (Check) For:	Robert C Naftz
	ATTR	CAMILLE	Plaintiff: Pocatello Hospital, LLC Attorney Retained Kent L Hawkins	Robert C Naftz
	ATTR	CAMILLE	Plaintiff: Portneuf Medical Center Attorney Retained Kent L Hawkins	Robert C Naftz
1/4/2013		CAMILLE	Motion for personal service on out of state defendant; aty William Hancock for plntf	Robert C Naftz
		CAMILLE	Affidavit of counsel in support of motin for personal service on out of state defendant: aty William Hancock for plntf	Robert C Naftz
1/7/2013		CAMILLE	Order allowing personal service on out of state defendant: s/Judge Naftz 1-7-2013	Robert C Naftz
		CAMILLE	Acceptance of service - srvd on Quail Ridge Medical Investors on 1-7-2013	Robert C Naftz
1/29/2013		MARLEA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: beard st clair gaffney Receipt number: 0002837 Dated: 1/29/2013 Amount: $66.00 (Check) For: Quail Ridge Medical Investors, Llc, (defendant)	Robert C Naftz
	ANSW	CAMILLE	Answer and Jury Demand; aty John Avondet for defs	Robert C Naftz
	ATTR	NICOLE	Defendant: Preston, Forrest Attorney Retained John M Avondet	Robert C Naftz
	ATTR	NICOLE	Defendant: Quail Ridge Medical Investors, Llc, Attorney Retained John M Avondet	Robert C Naftz
2/1/2013		CAMILLE	Order for submission of information for scheduling order; s/ Judge 2-1-2013	Robert C Naftz
2/6/2013	HRSC	NICOLE	Hearing Scheduled (Motion 03/04/2013 01:30 PM) Motion for Stay (Defendant's)	Robert C Naftz
2/7/2013		CAMILLE	Defendants Motion for stay; aty Michael Gaffney for def	Robert C Naftz
		CAMILLE	Defendants Memorandum in support of motion for stay ; aty Michael Gaffney for def	Robert C Naftz
		CAMILLE	Affidavit of counsel in support of defs motion for stay; aty Michael Gaffney for defs	Robert C Naftz
		CAMILLE	Notice of hearing; set for 3-4-2013 @ 1:30 pm:	Robert C Naftz

Pocatello Hospital, LLC, Portneuf Medical Center LLC vs. Quail Ridge Medical Investors, Llc, Forrest Preston

Date	Code	User		Judge
2/21/2013		CAMILLE	Amended agreed response to order for submission of information for scheduling order; aty Kent Hawkins	Robert C Naftz
2/25/2013		CAMILLE	Plaintiff objection to defs motion for stay and alternatively request for Bond: aty Dave Gallafent for plntf	Robert C Naftz
		CAMILLE	Affidavit of counsel in support of plaintiffs objection to defs motion to stay; aty Dave Gallafent for plntf	Robert C Naftz
		CAMILLE	Affidavit of Don Wadle; aty Dave Gallafent for plntf	Robert C Naftz
3/1/2013		CAMILLE	Defendants Reply Memorandum in support of motion for stay; aty John "Avondet for defs	Robert C Naftz
3/4/2013	DCHH	NICOLE	Hearing result for Motion scheduled on 03/04/2013 01:30 PM: District Court Hearing Hel Court Reporter: Stephanie Davis Number of Transcript Pages for this hearing estimated: less than 100 pages Motion for Stay (Defendant's); court granted Defendant's motion but requires them to post a bond in the amount of declaratory judgment signed by Judge Brown in a separate matter	Robert C Naftz
6/13/2013		CAMILLE	Affidavit of counsel in support of motion to compel; aty William Hancock for plntf	Robert C Naftz
		CAMILLE	Motion to compel; aty William Hancock for plntf	Robert C Naftz
6/14/2013	HRSC	NICOLE	Hearing Scheduled (Motion to Compel 07/08/2013 01:30 PM) Plaintiff's motion	Robert C Naftz
6/17/2013		CAMILLE	Notice of hearing; set for Plntfs Motion to compel on 7-8-2013 at 1:30 pm: aty William Hancock	Robert C Naftz
7/1/2013		CAMILLE	Defendants Memorandum in oppposition to Motion to compel; aty Michael GAffney for defs	Robert C Naftz
7/8/2013	DCHH	NICOLE	Hearing result for Motion to Compel scheduled on 07/08/2013 01:30 PM: District Court Hearing Held Court Reporter: Stephanie Davis Number of Transcript Pages for this hearing estimated: less than 100 pages Plaintiff's motion granted; counsel for Plaintiff to prepare order; bond posted by 7-22-13 at 5:00 pm or stay lifted; attorney fees and costs also awarded	Robert C Naftz
7/11/2013		CAMILLE	Minute entry and order; plaintiffs motion to compel is granted; s/ Judge Naftz 7-11-2013	Robert C Naftz
8/2/2013		CAMILLE	Amended Order for submission of information for scheduling order; s/ Judge Naftz 8-2-2013	Robert C Naftz
8/14/2013		CAMILLE	Agreed response to Order for submission of information for scheduling order; aty Kent Hawkins for plntf	Robert C Naftz

Pocatello Hospital, LLC, Portneuf Medical Center LLC vs. Quail Ridge Medical Investors, Llc, Forrest Preston

Date	Code	User		Judge
8/22/2013	HRSC	NICOLE	Hearing Scheduled (Jury Trial 07/15/2014 09:00 AM) First setting One day requested	Robert C Naftz
	HRSC	NICOLE	Hearing Scheduled (Jury Trial 10/14/2014 09:00 AM) Backup setting One day requested	Robert C Naftz
8/26/2013		CAMILLE	Scheduling Order, Notice of Trial setting and initial pretrial order; s/ Judge Naftz 8-25-2013	Robert C Naftz
9/5/2013	HRSC	NICOLE	Hearing Scheduled (Motion for Summary Judgment 10/21/2013 01:30 PM) Plaintiff's motion	Robert C Naftz
		CAMILLE	Plaintiff motion for summary judgment; aty William Hancock for plntf	Robert C Naftz
		CAMILLE	Affidavit of Don Wadle; aty William Hancock for plntf	Robert C Naftz
		CAMILLE	Brief in support of plaintiffs motion for summary judgment; aty William Hancock for plntf	Robert C Naftz
		CAMILLE	Affidavit of counsel in support of plaintiffs motion for summary judgment; aty William Hancock for plntf	Robert C Naftz
		CAMILLE	Notice of hearing; set for Plaintiffs Motion for summary judgment on 10-21-2013 @ 1:30 pm:	Robert C Naftz
9/23/2013		CAMILLE	Defendants Cross Motion for Summary Judgment; aty John Avondet for defs	Robert C Naftz
		CAMILLE	Defendants Memorandum in support of Cross Motion for Summary Judgment; aty John Avondet for defs	Robert C Naftz
		CAMILLE	Affidavit of John M Avondet in support of defs cross motion for summary judgment; aty John Avondet for defs	Robert C Naftz
		CAMILLE	Notice of hearing; set for Defs Cross Motion for Summary Judgment; 10-21-2013 @ 1:30 pm:	Robert C Naftz
10/7/2013		CAMILLE	Affidavit of Michael Gaffney in opposition to plaintiff's motion for summary judgment: aty Michael Gaffney	Robert C Naftz
		CAMILLE	Defendants Memorandum in opposition to motion for summary judgment; aty Michael Gaffney for defs	Robert C Naftz
10/15/2013		CAMILLE	Plaintiffs reply in support of its motin for summary judgment; aty William Hancock for plntf	Robert C Naftz

Pocatello Hospital, LLC, Portneuf Medical Center LLC vs. Quail Ridge Medical Investors, Llc, Forrest Preston

Date	Code	User		Judge
10/21/2013	DCHH	NICOLE	Hearing result for Motion for Summary Judgment scheduled on 10/21/2013 01:30 PM: District Court Hearing Held Court Reporter: Stephanie Davis Number of Transcript Pages for this hearing estimated: more than 100 pages; Plaintiff's motion granted by the Court; counsel will submit order for the Court's review	Robert C Naftz
10/22/2013		CAMILLE	Defendants objection to proposed judgment; aty Michael Gaffney for defs	Robert C Naftz
10/23/2013		CAMILLE	Judgment; Defendant are hereby ordered to pay, jointly and severally unpaid current annual rent for the 2010 rent adjustment period in a sum of $416,812.50: s/ Judge Naftz 10-22-2013	Robert C Naftz
11/6/2013		CAMILLE	Plaintiffs memorandum of costs and attorney fees; aty Dave Gallafent for plntf	Robert C Naftz
		CAMILLE	Plaintiffs motion for costs and attorney fees: aty Dave Gallafent for plntf	Robert C Naftz
11/7/2013		DCANO	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Beard St. Clair Gaffney Receipt number: 0035253 Dated: 11/8/2013 Amount: $109.00 (Check) For: Preston, Forrest (defendant) and Quail Ridge Medical Investors, Llc, (defendant)	Robert C Naftz
	APSC	DCANO	Appealed To The Supreme Court	Robert C Naftz
	NOTC	DCANO	NOTICE OF APPEAL: Michael D. Gaffney, Attorney for Defendants Quail Ridge Medical Investors, LLC and Forrest L. Preston.	Robert C Naftz
	MISC	DCANO	Received Check # 105804 in the amount of $100.00 for deposit of Clerk's Record on 11-7-13.	Robert C Naftz
11/8/2013	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL: Signed and Mailed to Counsel and Supreme Court on 11-8-13.	Robert C Naftz
11/19/2013		DCANO	Respondent's Request for Additional Records and Reporter's Transcript: R. William Hancock, Attorney for Plntfs. (Mailed copy to SC on 11-21-13)	Robert C Naftz
11/20/2013	HRSC	NICOLE	Hearing Scheduled (Motion 12/16/2013 02:30 PM) Motion for Costs and Attorney's Fees	Robert C Naftz
		CAMILLE	Defendants Motion to disallow costs and fees; aty John Avonder for defs	Robert C Naftz
		CAMILLE	Defendants Memorandum in support of defs motion to disallow costs and fees: aty John Avonder	Robert C Naftz

Pocatello Hospital, LLC, Portneuf Medical Center LLC vs. Quail Ridge Medical Investors, Llc, Forrest Preston

Date	Code	User		Judge
11/21/2013	MISC	DCANO	IDAHO SUPREME COURT: Received notice of Appeal. Clerk's Record and Reporter's Transcripts due 2-14-14. (Due 5 weeks prior to Counsel on 1-10-14) Docket # 41589-2013. Transcripts to be lodged with Court Records: Summary Judgment held 10-21-13.	Robert C Naftz
		CAMILLE	Notice of hearing; set for 12-16-2013 @ 2:30 pm: aty R William Hancock for plntf	Robert C Naftz
11/26/2013	MISC	DCANO	IDAHO SUPREME COURT; Received a Cert. Copy of Respondent's Request for Additional Records and Reporter's Transcript filed in Dist. Court 11-25-12. (Respondent counsel failed to identify the reporter for each additional transcripts requested and did not serve the reporter as required by the Idaho Appellate Rules, Thus no additional transcripts will be required at this time) Transcripts and Clerk's Record Remains Due 2-24-14. (Counsel's due 1-20-14, 5 weeks prior)	Robert C Naftz
11/27/2013		CAMILLE	Amended respondents request for additional records and reporters transcript; aty William Hancock for plntf	Robert C Naftz
12/11/2013		KENDRAH	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Beard St Clair Gaffney Receipt number: 0038574 Dated: 12/11/2013 Amount: $1.50 (Check)	Robert C Naftz
12/16/2013	DCHH	NICOLE	Hearing result for Motion scheduled on 12/16/2013 02:30 PM: District Court Hearing Hel Court Reporter: Stephanie Davis Number of Transcript Pages for this hearing estimated: less than 100 pages Motion for Costs and Attorney's Fees; court will prepare written order with final judgment	Robert C Naftz
12/23/2013		DCANO	IDAHO SURPEME COURT; Transcript and Clerk's Record Due 2-24-12 ** 3-4-13 Stay; 07-08-13 Compel; 10-21-13 Summary Judgment.	Robert C Naftz
1/8/2014		CAMILLE	Order regarding attorney fees; Plaintiffs motion for costs and attorney fees is GRANTED, for $16,830.93: s/ Judge Naftz 1-7-2014	Robert C Naftz
	JDMT	CAMILLE	Final Judgment; Plaintiff is awarded judgment in the amount of $462,033.80: s/ Judge Naftz 1-7-2014	Robert C Naftz
	CSTS	CAMILLE	Case Status Changed: Closed pending clerk action	Robert C Naftz
1/10/2014		KENDRAH	Miscellaneous Payment: Copies Paid by: Merrill & Merrill Chartered Receipt number: 0001006 Dated: 1/10/2014 Amount: $11.00 (Check)	Robert C Naftz

Pocatello Hospital, LLC, Portneuf Medical Center LLC vs. Quail Ridge Medical Investors, Llc, Forrest Preston

Date	Code	User		Judge
1/21/2014	MISC	DCANO	Notice of Lodging(E-mail only, couldn't open with her computer program) received from S.Davis 1-21-14.	Robert C Naftz
	MISC	DCANO	REPORTER'S TRANSCRIPTS received in Court Records on 1-21-14 for the following: Plntf's Motion Summary Judgment and Dfdts. Corss Motion Sum. Judg. held 10-21-13.	Robert C Naftz
2/5/2014		CAMILLE	Amended Notice of Appeal; aty John Avondet for Defendants	Robert C Naftz
2/7/2014	MISC	DCANO	AMENDED CLERK'S CERT. OF APPEAL: Signed and Mailed to Counsel and Supreme Court on 2-7-14.	Robert C Naftz
2/11/2014		DCANO	IDAHO SUPREME COURT; Filed Amended NOtice of Appeal. Transcripts and Clerk's Record due 4-3-14. Transcripts: Summary Judgment held 10-21-13 Costs & Fees held 12-16-13.	Robert C Naftz
2/21/2014	MISC	DCANO	Stipulation re: Record on Appeal: Michael D. Gaffney, Attorneys for Defendants.	Robert C Naftz
	ORDR	DCANO	Order Re: Record on Appeal: The Reocrd on Appeal be augmented to include the Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment, submitted on Oct. 8, 2013 and Defendant's Reply Memorandum in Support of Cross-Motion for Summary Judgment, Submitted on 10-14-13. Signed Judge Robert C. Naftz on 2-21-14.	Robert C Naftz
2/25/2014	MISC	DCANO	SENT CERT. COPIES OF STIPULATION AND ORDER REGARDING RECORD ON APPEAL TO SC ON 2-25-14.	Robert C Naftz
	MISC	DCANO	CLERK'S RECORD (cd) Received in Court Records on 2-26-14.	Robert C Naftz

FILED
BANNOCK COUNTY
DISTRICT COURT
12 DEC 13 PM 3:55
BY
DEPUTY

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

ROBERT C. NAFTZ

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV 12-5289 OC COMPLAINT FEE CATEGORY: A FEES $96.00

COMES NOW the Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC, by and through its attorneys, Merrill and Merrill, Chartered, and for its action against the Defendants, Quail Ridge Medical Investors, LLC, and Forrest L. Preston, an individual, alleges as follows:

1. Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC"), is a Delaware limited liability company authorized to do business in the State of Idaho with its principal place of business in the State of Idaho at 651 Memorial Drive, Pocatello, Bannock County, Idaho 83201.

2. Defendant, Quail Medical Investors, LLC ("Quail"), is a Tennessee limited liability

company authorized to do business in the State of Idaho, whose principal place of business is 3570 Keith Street NW, Cleveland, Tennessee 37312.

3. Defendant, Forrest L. Preston ("Preston"), is an individual residing in Tennessee and whose business address is 3001 Keith St., Cleveland, Tennessee. Preston is an owner of Quail.

4. This lawsuit arises from a dispute regarding the amount of rent due under a *Ground Lease Agreement,* dated January 27, 1983 ("Lease Agreement"). That dispute was resolved by a declaratory judgment entered, following a two (2) day bench trial, by the Honorable Mitchell W. Brown, District Judge for the Sixth Judicial District, which judgment declared the amount of rent that was past due.

5. The declaratory judgment action was filed June 29, 2010 by PMC seeking, among other things, to have the court declare the rent that Quail should have paid to PMC under the Lease Agreement for the period between February 1, 2010 and January 31, 2013 (the "2010 Rent Adjustment Period").

6. PMC is the successor in interest to the lessor in the Lease Agreement, succeeding to the interests of Intermountain Health Care, Inc., and was the plaintiff in the declaratory judgment action decided by Judge Brown.

7. Quail is the successor in interest to the lessee in the Lease Agreement, succeeding to the interests of Sterling Development Co., and was the defendant in the declaratory judgment action decided by Judge Brown.

8. Judge Brown entered his *Findings of Fact, Conclusions of Law, and Memorandum Decision and Order*, and then on November 26, 2012 entered an *Amended Declaratory Judgment.* A true and correct copy of the *Amended Declaratory Judgment* is attached hereto as Exhibit 2, and is incorporated herein by this reference.

9. In his Amended Declaratory Judgment, Judge Brown declared that "...Quail Ridge is obligated to promptly pay PMC $416,812.50 under the terms of the parties' Ground Lease Agreement." Pursuant to the Amended Declaratory Judgment, that sum is the amount of rent that is now past due for the 2010 Rent Adjustment Period.

10. This lawsuit further arises from the *Guarantee in Payment and Performance*, dated June 1, 2001 ("Guarantee"), in which Preston Guaranteed payment of the rent due in the *1983 Ground*

Lease. A true and correct copy of this Guarantee is attached hereto as Exhibit 1, and is incorporated herein by this reference.

11. PMC is the successor in interest to IHC Health Services, Inc. in that *Guarantee in Payment and Performance.*

12. Both Quail and Preston have failed to pay the amount stated to be due in the *Amended Declaratory Judgment* , even though on November 26, 2012 the court served Quail with a copy of the *Amended Declaratory Judgment* and said judgment stated that the unpaid rental amount of $416,812.50 was "promptly" due.

13. Because of Quail's and Preston's failure to make prompt payment, PMC on November 27, 2012 sent a written demand to both Quail and Preston for payment of the remaining rent that Judge Brown had declared in his *Amended Declaratory Judgment* to be promptly due. Although more than ten days have passed since the court served the *Amended Declaratory Judgment* on Quail, and more than ten days have passed since the demand Letter was sent to Quail and Preston, neither Quail nor Preston have paid any portion of the amount due.

COUNT I
BREACH OF CONTRACT

14. PMC realleges and incorporates the allegations in Paragraphs 1 through 13 above as if they had been set forth fully herein.

15. Pursuant to Judge Brown's Amended Declaratory Judgment, Quail is obligated under the Ground Lease Agreement to promptly pay PMC the sum of $416,812.50.

16. By failing to promptly pay the rent that Judge Brown declared to be due under the contract, Quail breached the Ground Lease Agreement.

17. Quail owes PMC a sum of $416,812.50 in unpaid rents for the 2010 Rent Adjustment Period, plus interest on this liquidated amount at a rate of 12% per annum from and after November 26, 2012, plus attorney fees and costs that PMC has had to incur in collection of these unpaid rents.

COUNT II
BREACH OF PERSONAL GUARANTEE

18. PMC realleges and incorporates the allegations in Paragraphs 1 through17 above, as if they had been set forth fully herein.

19. Pursuant to the Guarantee Preston "unconditionally guarantee[d] the payment and performance of any and all obligations of Quail Medical Investors, LLC, a Tennessee Limited Liability Company ("Quail Ridge")...under the Ground Lease."

20. Furthermore, under the terms of that Guarantee, Preston agreed that "upon any default, [the landlord], at its option [may] proceed directly, and at once, without notice, against [Preston] without proceeding against Quail...or any other person."

21. Preston also agreed that "without demand, [he would] immediately reimburse and pay for all costs and expenses, including reasonable attorney fees, incurred in the enforcement of this Guarantee."

22. Although written demand has been made upon Preston for the payment of unpaid rents for the 2010 Rent Adjustment Period, Preston has failed to pay the $416,812.50 currently due and owing as he was obligated to do under the terms of the Guarantee.

23. Preston is in breach of his obligations under the Guarantee and is jointly and severally obligated to pay the full amount due.

24. Preston owes PMC the unpaid rent of $416,812.50 for the 2010 Rent Adjustment Period, plus interest in an amount of 12% for this liquidated account from and after November 26, 2012, plus reasonable attorney fees, costs and expenses involved in bringing this action.

ATTORNEYS FEES

25. PMC has retained the services of Merrill and Merrill, Chtd. to bring this suit. PMC is entitled to an award of attorney fees and costs pursuant to the terms of the Lease Agreement; pursuant to the terms of the Guarantee; pursuant to Idaho Code §§ 12-120 to 12-121 and 12-123; and, pursuant to Rule 54 of the Idaho Rules of Civil Procedure.

WHEREFORE the Plaintiff, Pocatello Hospital d/b/a Portneuf Medical Center, LLC, prays that judgment be entered in PMC's favor and against the Defendants as follows:

1. Defendants should be ordered to pay, jointly and severally, unpaid current annual rent for the 2010 Rent Adjustment Period in a sum of not less than $416,812.50;

2. Defendants should be ordered to pay interest on this amount from and after the date of the *Amended Declaratory Judgment*, November 26, 2012, at an annual rate of 12% until the date the Court enters its judgment.

3. Defendants should be ordered to pay PMC's attorneys fees and costs associated with the bringing of this current action; and

4. For such and further relief this Court deems just and equitable under the circumstances of this case.

DATED this 13 day of December, 2012.

MERRILL & MERRILL, CHTD.

By _____
Kent L. Hawkins
Attorneys for Plaintiff, PMC

GUARANTEE OF PAYMENT AND PERFORMANCE

By the execution hereof, and as a condition precedent to, and as inducement for, the execution and delivery by IHC Health Services, Inc., a Utah nonprofit corporation ("IHCHS"), of that certain Landlord Consent and Estoppel, dated as of June 1, 2001, and the foregoing Amendment, FORREST L. PRESTON, individually, unconditionally guarantees the payment and performance of any and all obligations of Quail Ridge Medical Investors, LLC, a Tennessee limited liability company ("Quail Ridge") and/or Pocatello Medical Investors Limited Partnership, a Tennessee limited partnership ("PMI"), under the "Ground Lease" and the "Sublease" (each as defined in the foregoing Amendment). To the fullest extent possible, the undersigned expressly waives notice of the acceptance of this Guarantee, notice of demand for payment, notice of nonpayment, notice of other default, notice of suit, and all other notices to which the undersigned might otherwise be entitled in connection with this Guarantee. Further, the undersigned waives any responsibility or duty IHCHS may have to the undersigned to proceed against Quail Ridge and/or PMI or to pursue any other legal remedy available. Upon any default, IHCHS may, at its option, proceed directly, and at once, without notice, against the undersigned without proceeding against Quail Ridge and/or PMI or any other person. In addition, the undersigned further agrees, without demand, immediately to reimburse and pay for all costs and expenses, including reasonable attorneys' fees, incurred in the enforcement of this Guarantee.

DATED as of the 1st day of June, 2001.

FORREST L. PRESTON

EXHIBIT 1

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2012 NOV 26 PM 5:06
BY _____
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

******

POCATELLO HOSPITAL, LLC, dba PORTNEUF MEDICAL CENTERS, LLC, Plaintiff,	Case No.	CV-2010-0002724-OC
vs.		**AMENDED DECLARATORY JUDGMENT**
QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, Defendants.		

Following a two (2) day bench trial conducted before the Court commencing on May 14, 2012 and concluding on May 15, 2012 and the Court having rendered its Findings of Fact, Conclusions of Law, and Memorandum Decision and Order the Court hereby enters this **DECLARATORY JUDGMENT** pursuant to Idaho Code §§ 10-1201 through 10-1203. This Declaratory Judgment declares the parties' respective rights and obligations with respect those issues. This Declaratory Judgment deals specifically with the rent adjustment provisions of the parties' Ground Lease Agreement (Section 1.3(b) and generally with sections 1.1, 1.2 and 1.3(a) of the parties' Ground Lease Agreement.

The Court hereby **ORDERS ADJUDGES AND DECREES** as follows:

(1) Pocatello Hospital, LLC dba Portneuf Medical Centers (PMC) is entitled to an adjustment in the annual rent owed by Quail Ridge Medical Investors, LLC (Quail Ridge) under the parties Ground Lease Agreement from $9,562.50 annually to $148,500.00 annually.

EXHIBIT
2

(2) This rent adjustment is for the three (3) period commencing on February 1, 2010 and concluding on January 31, 2013. Therefore the total rent due PMC from Quail Ridge is the amount of $445,500.00 for this three (3) year period.

(3) Quail Ridge has already paid PMC $9,562.00 annual rent on or about February 1 each year during that three year period for a total amount paid of $28,687.50.

(4) Therefore, based upon the rent adjustment, Quail Ridge is obligated to promptly pay PMC $416,812.50 under the terms of the parties' Ground Lease Agreement.

(5) The rent adjustment provision of the Ground Lease Agreement, dated January 27, 1983, of which PMC is the successor Lessor and Quail Ridge is the successor Lessee remains in full force and effect. The next rent adjustment, which is scheduled to take effect February 1, 2013, shall proceed consistent with section 1.3(b) of the Ground Lease Agreement.

IT IS SO ORDERED.

Dated this 26th day of November, 2012.

Mitchell W. Brown

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that on the 12th day of November, 2012, she caused a true and correct copy of the foregoing Order on Form of Judgment to be served upon the following persons in the following manner:

PLAINTIFF ATTORNEY:
Kent L. Hawkins
P.O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2499

☒ Faxed

DEFENDANT ATTORNEY:
Michael D. Gaffney
2105 Coronado State
Idaho Falls, Idaho 83404
(208) 529-9732

☒ Faxed

DALE HATCH, Clerk

By: Deputy Clerk

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

BANNOCK COUNTY CLERK
2013 JAN -3 PM 3:30
BY DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **ORDER ALLOWING PERSONAL SERVICE ON OUT OF STATE DEFENDANT**

THIS COURT having received the *Motion for Service on Out of State Defendant*, and supporting Affidavit of Counsel, in accordance with the statutes and Idaho Rules of Civil Procedure, and the Court being otherwise fully advised in the premises and good cause appearing therefore,

IT IS HEREBY ORDERED that a copy of the Summons and Complaint be personally served on Forrest L. Preston in the state of Tennessee, or elsewhere where he may be found.

DATED this 7 day of January, 2013.

Robert C. Naftz
Honorable Robert C. Naftz

CLERK'S CERTIFICATE OF SERVICE

The undersigned Clerk of Court, does hereby certify that a true, full and correct copy of the foregoing *Order Allowing Personal Service on Out of State Defendant* was this 7 day of January, 2013, served upon the following in the manner indicated below:

R. William Hancock
MERRILL & MERRILL, CHTD
P.O. Box 991
Pocatello, Idaho 83204-0991

[✓] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Telefax

Deputy Clerk

FILED
BANNOCK COUNTY
DISTRICT COURT
12 JAN 29 AM 9:50
BY
DEPUTY

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Answer and Jury Demand

The defendants (collectively Quail Ridge) through counsel of record, Beard St. Clair Gaffney PA, respectfully submit the following Answer to the Complaint filed by the plaintiff, Pocatello Hospital, LLC dba Portneuf Medical Center, LLC (PMC). Any paragraph not specifically admitted is denied.

Answer

1. Admit paragraph 1.
2. Admit paragraph 2.
3. Admit paragraph 3.

4. Deny paragraph 4.

5. Deny paragraph 5.

6. Admit paragraph 6.

7. As to paragraph 7, deny that Quail Ridge was the sole defendant in the declaratory judgment action. Admit the remainder of the paragraph.

8. Admit paragraph 8.

9. Deny paragraph 9.

10. Deny paragraph 10.

11. Quail Ridge is without knowledge as to the allegations contained in paragraph 11; therefore, Quail Ridge denies paragraph 11.

12. Deny paragraph 12.

13. Deny paragraph 13.

14. Paragraph 14 realleges the prior paragraphs of the complaint. Quail Ridge incorporates its answers to the preceding allegations herein.

15. Deny paragraph 15.

16. Deny paragraph 16.

17. Deny paragraph 17.

18. Paragraph 18 realleges the prior paragraphs of the complaint. Quail Ridge incorporates its answers to the preceding allegations herein.

19. Deny paragraph 19.

20. Deny paragraph 20.

21. Deny paragraph 21.

22. Deny paragraph 22.

23. Deny paragraph 23.

24. Deny paragraph 24.

25. Deny paragraph 25.

Affirmative Defenses

1. The complaint fails to state a claim upon which relief may be granted.
2. The complaint is barred by the applicable statute of limitations.
3. The complaint is barred by res judicata.
4. The complaint is barred by the doctrine of collateral estoppel.
5. The complaint is barred by waiver.
6. The complaint is barred by the doctrine of contract modification.
7. The complaint is barred because the subject contract alleged herein lacked a meeting of the minds.
8. The complaint is barred by laches.
9. The proceedings should be stayed pending the outcome of the appeal in Bannock County Case No. CV-10-2724-OC, Idaho Supreme Court Docket No. 40566-2012.
10. The complaint is barred because there has been no breach of contract.
11. The complaint is barred because the guarantee is not enforceable.
12. The complaint is barred on the basis that it has failed to mitigate its damages, if any.
13. The complaint is barred by the doctrine of estoppel.
14. The complaint is barred because the plaintiff has failed to join necessary or indispensible parties.
15. The complaint is barred because the plaintiff is not the real party in interest.

16. The plaintiff's claims are barred because the defendants' conduct was not the proximate cause of the plaintiff's harms, if any.

Jury Demand

The defendants demand trial by jury pursuant to Rule 38 of the Idaho Rules of Civil Procedure on all issues so triable.

Prayer for Relief

Wherefore, Quail Ridge prays for the following relief from this Court:

1. Entry of judgment for the defendants and against the plaintiff with the plaintiff taking nothing thereby.
2. Awarding Quail Ridge its full attorney fees and costs pursuant to the Ground Lease Agreement, Idaho Rule of Civil Procedure 54, and Idaho Code § 12-120.
3. Entry of an order dismissing the plaintiff's complaint with prejudice.
4. Granting the defendants any other relief as deemed just and proper under the circumstances.

DATED: January 28, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on January 28, 2013, I served a true and correct copy of the ANSWER AND JURY DEMAND on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

FILED
BANNOCK COUNTY
CLERK OF THE COURT
13 FEB -7 AM 11:50
BY _____ DEPUTY

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Defendants' Motion for Stay

The defendants, through counsel of record, Beard St. Clair Gaffney PA, respectfully move this Court for a stay in this action pending the outcome of Quail Ridge's appeal identified as Idaho Supreme Court Docket No. 40566-2012. The basis for this motion is set forth in and supported by the memorandum and affidavit of counsel filed contemporaneously herewith.

Oral argument is requested.

DATED: February 6, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on February 6, 2013, I served a true and correct copy of the DEFENDANTS' MOTION FOR STAY on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☑ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

FILED
BANNOCK COUNTY
CLERK OF THE COURT
13 FEB -7 AM 11:53
BY _____ DEPUTY

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Affidavit of Counsel in Support of Defendants' Motion for Stay

STATE OF IDAHO)

)ss.

County of Bonneville)

John M. Avondet, having been duly sworn on oath, deposes and states:

1. I am an attorney with the law firm, Beard St. Clair Gaffney PA, and counsel for the defendants in the above entitled action.

2. I am competent to testify and do so through personal knowledge.

3. Attached as Exhibit A is a true and correct copy of the Defendant's Amended Notice of Appeal, dated November 28, 2012.

DATED: February 6, 2013

John M. Avondet

Subscribed and sworn to before me on this 6th day of February, 2013.

Notary Public for Idaho
Residing at: Idaho Falls, Idaho
My Commission Expires: 9/11/14
(SEAL)

JESSICA WILSON NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on February 6, 2013, I served a true and correct copy of the AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' MOTION FOR STAY on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendant/Respondent

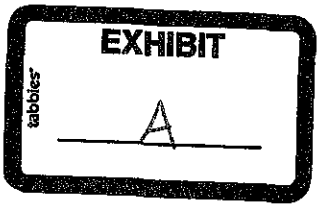
DISTRICT COURT SIXTH JUDICIAL DISTRICT BANNOCK COUNTY IDAHO

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTERS, LLC, Plaintiff/Respondent, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, Defendant/Appellant.	Case No.: CV-10-2724 OC DEFENDANT'S AMENDED NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTERS, LLC, AND THE PARTIES' ATTORNEYS, KENT L. HAWKINS AND R. WILLIAM HANCOCK, 109 NORTH ARTHUR-5TH FLOOR, P.O. BOX 991, POCATELLO, IDAHO 83204, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Quail Ridge Medical Investors, LLC, appeals against the above named respondents to the Idaho Supreme Court from Findings of Fact and Conclusions of Law entered October 17, 2012, the Declaratory Judgment entered,



November 13, 2012, and the Amended Declaratory Judgment entered on November 26, 2012, in the above entitled action, the Honorable Mitchell W. Brown, presiding.

2. Quail Ridge Medical Investors, LLC has a right to appeal to the Idaho Supreme Court and the orders from which this appeal is taken is appealable pursuant to Idaho Appellate Rule 11(a)(1).

3. The issues raised on this appeal are as follows:

   a. Whether the district court erred by disregarding language contained in the contract in declaring the rights and obligations of the parties arising under that contract;

   b. Whether the district court erred by failing to find that the rent adjustment clause of the Ground Lease had been waived or modified by the subsequent conduct and/or transactions of the parties;

   c. Whether the district court erred by failing to find that the plaintiff was estopped from seeking any adjustment in rent due to the 2001 Landlord Consent and Estoppel Certificate;

   d. Whether the district court erred by creating a new contract term that was unsupported by the evidence;

   e. Whether the district court erred by finding an absence of course of dealing by the parties;

   f. Whether the district court erred in the method, manner, evidence relied upon, and calculation of any adjusted rent amount; and,

   g. Whether the district court erred in admitting the testimony of Brad Janoush.

4. The appellant requests a standard transcript of trial in this matter, held on May 14-15, 2012. In addition to the standard transcript, the appellant requests the preparation of the following portions of the reporters transcript:

a. A standard transcript of the hearing held on March 26, 2012;

b. A standard transcript of the hearings held on April 30, 2012;

c. A standard transcript of the hearing held on May 4, 2012;

d. A standard transcript of the hearing held on May 10, 2012.

5. The appellant requests the following documents be included in the clerk's record in addition to those automatically included under Rule 28 of the Idaho Appellate Rules:

a. Copies of all deposition transcripts accepted by the Court and admitted in lieu of live testimony during trial;

6. The appellant requests that the following documents, charts, or pictures admitted as exhibits to be copied and sent to the Supreme Court:

a. All exhibits admitted during trial.

7. I certify:

a. That a copy of this notice of appeal and any request for additional transcript have been served on each reporter of whom an additional transcript has been requested as names below at the address set out on the Certificate of Service;

b. That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript and any additional documents requested in the appeal;

c. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED: November 28, 2012

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Appellant

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on November 27, 2012, I served a true and correct copy of the DEFENDANT'S AMENDED NOTICE OF APPEAL on the following by the method of delivery designated below:

Dave R. Gallafent R. William Hancock Merrill & Merrill PO Box 991 Pocatello, ID 83204-0991 Fax: 232-2499	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Bannock County Courthouse 624 E. Center Pocatello, ID 83201 Fax: (208) 236-7012	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Honorable Mitchell Brown Caribou County Courthouse PO Box 775 Soda Springs, ID 83276 Fax: (208) 547-2147	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Rodney Felshaw Court Reporter Caribou County Courthouse PO Box 775 Soda Springs, ID 83276	☑ U.S. Mail	☐ Hand-delivered	☑ Facsimile

Michael D. Gaffney
John M. Avondet
Beard St. Clair Gaffney PA
Attorney for Defendants

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
13 FEB 25 PM 2:32
BY
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION TO STAY**

STATE OF IDAHO)
:ss
County of Bannock)

I, Kent L. Hawkins, being first duly sworn on this oath, deposes and states as follows:

1. I am one of the attorneys for the Plaintiff in the above-captioned matter.

2. Attached hereto as Exhibit 1 is a true and correct copy of the November 27, 2012 demand letter our firm sent to legal counsel for Quail Ridge Medical Investors, LLC, and Forest L. Preston.

3. Our firm never received a response to this written demand letter.

4. Attached hereto as Exhibit 2 is a true and correct copy of the *Findings of Fact, Conclusions of Law, and Memorandum Decision and Order*, entered by Judge Mitchell L. Brown on October 16, 2012, in Bannock County Case No. CV-2010-2724.

5. Attached hereto as Exhibit 3 is a true and correct copy of relevant experts from the Deposition of Forrest L. Preston, taken in Bannock County Case No. CV-2010-2724.

6. Attached hereto as Exhibit 4 is a true and correct copy of relevant experts from the Deposition of Jodi Thomas, taken in Bannock County Case No. CV-2010-2724.

DATED this 25 day of February, 2013.

By Kent L. Hawkins
Kent L. Hawkins

SUBSCRIBED AND SWORN TO before me this 25th day of ~~January~~ Feb. 8, 2013.

(SEAL) GAYLA SYPHUS NOTARY PUBLIC STATE OF IDAHO

Gayla Syphus
Notary Public for Idaho
Residing at: Pocatello
My Commission Expires: 3/9/2016

CERTIFICATE OF SERVICE

I, Kent L. Hawkins, the undersigned, one of the attorneys for the Plaintiff, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 25 day of February, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile

Kent L. Hawkins

DAVE R. GALLAFENT
KENT L. HAWKINS*
BRENDON C. TAYLOR
KENT A. HIGGINS*
JARED A. STEADMAN
R. WILLIAM HANCOCK
TYLER H. NEILL

*ALSO ADMITTED IN UTAH

MERRILL & MERRILL
CHARTERED
COUNSELORS AND ATTORNEYS AT LAW
109 N. ARTHUR - 5TH FLOOR
P.O. BOX 991
POCATELLO, IDAHO 83204-0991

A.L. MERRILL (1886-1961)
R.D. MERRILL (1893-1972)
W.F. MERRILL (1919-2005)

TELEPHONE:208-232-2286
FAX:208-232-2499

Founded in 1913

November 27, 2012

Via Facsimile: 529-9732
Michael D. Gaffney
Bread St. Clair
2105 Coronado St.
Idaho Falls, ID 83402

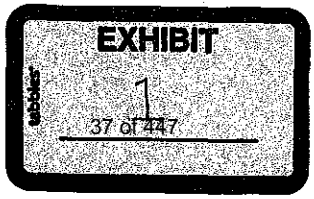
Re: Pocatello Hospital, LLC vs. Quail Ridge Medical Investors, LLC
(Bannock County Case No. CV-2010-0002724-OC)

Dear Mike:

We are in receipt of Judge Brown's Amended Declaratory Judgment entered yesterday in the above-referenced action, which judgment declares that your client "is obligated to promptly pay PMC $416,812.50 under the terms of the parties' Ground Lease Agreement." Accordingly, formal demand is hereby made on Quail Ridge and/or Forest Preston, individually, to "promptly" pay that amount to PMC.

Although we acknowledge receipt of your Notice of Appeal, we do not believe that the filing of such appeal has any impact on PMC's right to immediate payment of the past due rent which has now been declared by the Court as currently due and owing. Quail Ridge is obligated to make prompt payment of this amount under the terms of the parties' Ground Lease Agreement and Forest Preston, individually, is liable for this past due rent amount pursuant to the 2001 Guarantee of Payment and Performance executed by him.

As such, Quail Ridge and Forest Preston, individually, are hereby put on notice that if payment to PMC in the amount of $416,812.50 is not made within ten days, then PMC will consider Quail Ridge in breach of its rent obligations under the Ground Lease Agreement and Forest Preston in breach of his payment obligations under the Guarantee of Payment and Performance. If you do not consider yourself as legal counsel for Mr. Preston and are not authorized to accept this demand for payment on his behalf, please let us know as soon as possible so that we can make direct demand upon him. Quail Ridge and Mr. Preston should be aware that if full payment is not received within ten days, PMC will seek all legal remedies available to it under Idaho law, including but not limited to filing a legal action for collection of this outstanding rent. If such legal action becomes necessary, PMC will seek attorneys fees pursuant to Section 10.3 of the



Ground Lease Agreement; pursuant to the terms of the Guarantee of Payment and Performance; and, pursuant to Idaho Code §§ 12-120 to 12-121 and 12-123. Quail Ridge should take particular note that Section 10.3 of the Ground Lease Agreement provides that "such attorney's fee shall be deemed to have accrued at the commencement of such action and shall be paid whether or not such action is prosecuted to judgment." Forest Preston should take note that the Guarantee of Payment and Performance executed by him specifically provides that "the undersigned further agrees, without demand, immediately to reimburse and pay for all costs and expenses, including reasonable attorneys' fees, incurred in the enforcement of this Guarantee."

Additionally, pursuant to Idaho Code § 28-22-104, interest is accruing on the amount due at 12% per annum.

For your information, PMC is in the process of appraising the Quail Ridge Property to determine the rental rate for the 2013 rent adjustment period. We will share the appraisal with you as soon as we receive it.

In the meantime, if you have questions or if you wish to make additional arrangements for the payment of the remaining rent due for the 2010 rent adjustment period, or if you have any input regarding the market value of the property for the 2013 rent adjustment period, please do not hesitate to contact me or Kent Hawkins.

Sincerely,

MERRILL & MERRILL, CHTD.

Dave R. Gallafent
DRG/RWH/5975

cc: Client (via e-mail)

P.01

TRANSACTION REPORT

NOV-27-2012 TUE 04:23 PM

FOR: MERRILL & MERRILL 208 232 2499

SEND

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
NOV-27	04:23 PM	5299732	34"	3	FAX TX	OK	718	

TOTAL : 34S PAGES: 3

Merrill & Merrill
P.O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2286
Fax: (208) 232-2499

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: **208-529-9732**

Number of pages in addition to this cover sheet: 2

To: Michael D. Gaffney

Of: BEARD ST. CLAIR

From: Dave R. Gallafent/Gayla

Client/Matter: ***Pocatello Hospital v. Quail Ridge, et al***
Bannock County Case No. CV-10-2724-OC

Date: November 27, 2012

COMMENTS: Attached hereto please find my letter dated November 27, 2012 pursuant to the above-referenced matter. Please contact our office with any questions, thank you.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.
IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (208) 232-2286.

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2012 OCT 17 PM 12:50
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

******

POCATELLO HOSPITAL, LLC, dba PORTNEUF MEDICAL CENTERS, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, Defendants.	Case No. CV-2010-0002724-OC **FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM DECISION AND ORDER**

This action came before the Court for a two (2) day court trial commencing on May 14 and continuing through May 15, 2012. The Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC (PMC) was represented at trial by counsel, Kent L. Hawkins and R. William Hancock. Defendants, Quail Ridge Medical Investors, LLC (Quail Ridge) and Century Park Associates, LLC (Century Park) were represented by Michael D. Gaffney and John M. Avondet. At the conclusion of trial, the Court set forth a post-trial briefing schedule. The parties agreed to share the cost associated with the preparation of a transcript of the trial in advance of post-trial briefing. *See* Minute Entry and Order entered on May 17, 2012. The Court entered an order regarding remitting payment to the Court Reporter and preparation of the transcript of the trial. *See* Order entered on June 5, 2012. The parties were instructed to submit post-trial arguments along with their proposed findings of fact and conclusions of law. There were four (4) depositions which were submitted to the Court for its review as part of the trial record. Pursuant to stipulation of the

EXHIBIT
1
40 of 447

process contemplated by the Lease Agreement. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 3. PMC also requested that the Court enter summary judgment in its favor and declare that Quail Ridge owed PMC back rent for the years 2007 through 2011 in the amount of $735,187.50 and rent in the sum of $148,500.00 for 2012. *Id.* at p. 5. PMC argued that this result was justified under the clear and unambiguous language of the parties' Lease Agreement. Quail Ridge also filed a counter-motion for summary judgment. Quail Ridge argued that the Court should deny PMC's motion for summary judgment and grant summary judgment on its behalf. Quail Ridge argued that in 2001, "the ability to adjust rent was removed from the parties' agreement." Defendants' Motion for Summary Judgment, p. 1. The Court denied both parties' motions for summary judgment finding that the parties' Lease Agreement contained ambiguities that would require extrinsic evidence concerning the parties' intent, specifically as it related to Article I, section 1.3(b) of the Lease Agreement.

Numerous pre-trial motions were filed in anticipation of trial. Two (2) of these are procedurally significant. The first was PMC's Motion to Amend Complaint and the second was PMC's Motion to Enforce Jury Waiver Clause in 2001 Landlord Consent and Estoppel Certificate. PMC's Motion to Amend Complaint was granted without objection by Quail Ridge. *See* Defendants' Notice of Non-Opposition to Plaintiff's Motion to Amend Complaint. The Court likewise granted PMC's Motion to Enforce the Jury Waiver Clause in 2001 Landlord Consent and Estoppel Certificate.[3]

PMC's Amended Complaint sought damages that were not requested in the original Complaint, based upon an updated appraisal. The Amended Complaint also asserted a claim for

[3]Quail Ridge, in its initial Answer, demanded a jury trial as required by Rule 38 of the Idaho Rules of Civil Procedure. It also made a jury demand in its Answer to the Amended Complaint. PMC's Motion to Enforce Jury Waiver was granted by the Court on grounds different than argued by PMC, but was nonetheless granted and the Court ordered that the trial would proceed to the Court rather than the jury. The basis for this determination was set forth in detail on the record on May 4, 2012.

2. Deposition Testimony - Guy P. Kroesche.[4]

PMC submitted the deposition of Guy P. Kroesche (Kroesche) as part of its case on rebuttal. PMC submitted the following with regard to Kroesche's testimony: (1) During Quail Ridge's cross-examination of Kroesche the following question was asked:

> Okay. But you would agree that that language could have been easily inserted in the 2001 and 2002 estoppel certificates as it had been in the 1996 certificate, right.

Depo. Kroesche, p. 34, LL.11-14. The propounded question does require a yes or no response. Further, Kroesche's response is non-responsive. Instead, he explains that typically estoppel certificates are not identical from transaction to transaction. However, Kroesche fails to respond to the specific question, that being that certain language could have easily been inserted in the 2001 and 2002 estoppel certificates just as it had been in the 1996 certificate. Quail Ridge moved to strike this response as non-responsive. *Id.* at p. 35, LL. 10-11. PMC argues Kroesche was entitled to explain his reasons for not being able to answer "yes" or "no." The Court will **SUSTAIN** Quail Ridge's objection and find that Kroesche's answer was non-responsive and will strike the same.[5]

PMC also addresses an objection made by Quail Ridge during PMC's re-direct examination as being beyond the scope of Quail Ridge's cross-examination. This exchange centered on the following questions:

> First of all, there was a question about whether if there had been a modification to the 1983 Ground Lease Agreement, would it have been included in the estoppel certificate. Can you answer that?

---

[4]PMC withdrew any of the objections to questions asked by Quail Ridge during Kroesche's deposition. PMC's Objections to Deposition Testimony, p. 3. Therefore, the Court will address only those issues raised by PMC in PMC's Objections to Deposition Testimony.

[5]The Court has crossed through that portion of Kroesche's response which has been stricken by the Court. *See* original Kroesche deposition at p. 34, LL.15-25, p. 35, LL.1-6. The same question is re-asked on p. 37 of Kroesche's deposition when he is asked "you could have, when you prepared the '01 estoppel certificate and the '02 estoppel certificate, or when you were reviewing them, inserted language like that found in the 1996 estoppel certificate related to the rent adjustment provision, correct?" The response was "[y]es, I could have put many different words in this estoppel certificate ... including I could have written that [referring to the language from the 1996 estoppel certificate] in as well." This response will be **ADMITTED** over the objections of counsel as stated in the deposition.

PMC next argues that Quail Ridge's objection to the following question, on leading grounds, should be overruled because the question is not leading:

> [a]t any time did you ever promise or make a representation to a Quail Ridge representative, or representatives from the Pocatello Medical Investors that you would waive or limit the rights under the 1983 contract to limit or increase the rent provision – the amount of rent under that agreement?

Goodwin Depo. p. 18, LL.15-21. The Court will **OVERULE** this objection and allow the answer to stand.[7] The Court concludes that this question is not leading because it does not suggest the answer.

Quail Ridge reasserts all of the objections made during the course of Goodwin's deposition. The only objection asserted by Quail Ridge that has not been addressed above is its objection, on the ground of lack of foundation, to the following question:

> What I want to know is if during the period from 1983 to 2003 you were aware of this adjustment provision in the 1983 Ground Lease Agreement.

Goodwin Depo., p. 15, LL.18-21. The Court will **OVERRULE** this objection. The question asked if Goodwin was aware of the adjustment provision found in the Lease Agreement. He answers that he "was not specifically aware of this arrangement." The Court will allow this answer. Obviously Goodwin lacks foundation to answer any further questions about the so called "adjustment provision" of the Lease Agreement based upon his admission, but he certainly can testify to what he testified in response to this question.

[7]Goodwin's answer to this question was "no, sir." However, Goodwin then adds this unsolicited response "In fact, in paragraph 5 of that document, the last sentence of that paragraph says, 'Rent has been paid through and including February 28, 1996. Under Section 1.3(b) of the lease, the rent shall be adjusted on the next rent adjustment date, March 1, 1999 – 1998.'" This response is non-responsive and will be **STRICKEN** by the Court. PMC's question was limited in scope to whether Goodwin ever made any promises or representations to Sterling or Quail Ridge. The question called for a yes or no response. Goodwin's "no, sir" response will be allowed; the balance is non-responsive and will be struck. The Court has crossed through the stricken portion of the testimony in the original deposition of Goodwin.

Id. at p. 6, LL.16-18. Again, Quail Ridge objects on the basis that the question assumes facts not in evidence, lack of foundation of the witness to answer, and speculation.

The Court will **OVERRULE** both objections. The answers are really of no evidentiary value. Anton responds generally that he is sure that he would have seen the Lease Agreement and the reason he believes this is that he was the CEO of PMC from 1981 through 1984. Anton Depo., p. 5, LL.10-11. This is sufficient foundation to take the matter out of the realm of speculation. Further, the Lease Agreement is in evidence. The balance of Anton's deposition establishes that he has little or no recollection, surrounding the Lease Agreement or the facts or circumstances leading to its creation.

Quail Ridge next objects to the following question and answer:

> Q. Do you know what involvement he [Gerald Olson] had, if any, in the drafting of this Agreement?
>
> A. I do not, but he may have drafted the Agreement.

Id. at p. 7, LL.6-8. Quail Ridge objects to this response as being non-responsive. The Court will **OVERRULE** as it relates to Anton's response that he does not know what involvement Olson may have had in drafting the Lease Agreement. The balance of the answer and the objection based upon non-responsiveness will be **SUSTAINED.** The balance of this response is speculative and apparently beyond Anton's personal knowledge and/or recollection. Therefore, it will be **STRICKEN.**[8]

Next, Quail Ridge objects to the following exchange on the basis of vagueness, lack of foundation, and assumes facts not in evidence:

> Q. Do you have any recollection of that language in this Agreement at all from 1983?

[8]The Court has crossed through the portion of this response that has been stricken in the original deposition on file with the Court.

that the call of the question, seeking Anton's understanding as the CEO of what specific language meant, is suggestive of an answer. It is therefore, overruled on leading grounds. The Court has previously found that adequate foundation has been laid, establishing Anton's status as CEO at the time the Lease Agreement was entered and created, to allow him to testify regarding his recollection of this Lease Agreement and the circumstances surrounding its creation. Therefore, the objection is overruled on the foundation objection. Finally, the Court overrules on the speculation basis. Although Anton is being asked to recall matters that occurred nearly thirty (30) years ago, that will go to weight. To the extent he remembers the circumstances surrounding the creation of the Lease Agreement, his testimony will stand.

FINDINGS OF FACT

To the extent that any of the Court's Findings of Fact are deemed to be Conclusions of Law, they are incorporated in the Court's Conclusions of Law.

(1) PMC is a Delaware Limited Liability Company authorized to do business in the state of Idaho. PMC's principal place of business is 651 Memorial Drive, Pocatello, Idaho. Amended Complaint, p. 1, ¶1, Answer to Amended Complaint, p. 1, ¶1.

(2) Quail Ridge is a Tennessee Limited Liability Company authorized to do business in the state of Idaho. Quail Ridge's principal place of business is 3570 Keith Street NW, Cleveland Tennessee. Amended Complaint, p. 2, ¶2, Answer to Amended Complaint, p. 1, ¶1.

(3) Quail Ridge operates an assisted living center located in Pocatello, Idaho. The assisted living center is located on a 4.25 acre piece of real property which is currently owned by PMC.

(4) The building from which the assisted living center is run and operated is owned by

(5) PMC and Quail Ridge are successors in interest to a certain Ground Lease Agreement (Lease Agreement) entered into on January 27, 1983.

(6) The Lease Agreement was originally entered into between IHC and Sterling whereby IHC leased 4.25 acres of real property, as Lessor, to Sterling, as Lessee.

(7) PMC is the successor in interest to IHC and Bannock County as it relates to the Lease Agreement and occupies the role as lessor. Quail Ridge is the successor in interest to Sterling and occupies the role of lessee.

(8) The Lease Agreement is for a thirty (30) year term of years commencing on February 1, 1983 and concluding on January 31, 2013. However, the Lease Agreement provides for one (1) ten (10) year option to extend the term of the lease. This option is to be exercised, if at all, by "giving Lessor written notice ... not later than 120 days prior to the expiration date of the Term."[9] (Lease Agreement, p. 2, §1.2)

(9) The Lease Agreement also provides that rent shall be paid on an annual basis as follows:

> An initial annual rental [sic] shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre.[10]

(Lease Agreement, pp. 2-3, §1.3(a)).

(10) The total acreage of leased land was 4.25 acres. Therefore, the annual rent for the first three (3) years of the Lease Agreement was $9,562.50.

---

[9]The option appears to be personal to Sterling. However, this does not appear to be an issue between the parties, despite the fact that there was no evidence at trial concerning the personal nature of the option and the option having been exercised, the parties seem to agree that the option has been exercised, that it is assignable to Quail Ridge, and that the Lease Agreement is and will be in place through January 31, 2023. This state of affairs seems to be further confirmed by the Landlord Consent and Estoppel Certificate entered in 2001 where the parties state that the Lease Agreement has been extended through and including January 31, 2023. Therefore, these issues will not be addressed or considered by the Court.

[10]The Commencement Date of the Lease Agreement is defined as the 1st day of February, 1983, or on or before thirty (30) days after a building permit is issued whichever is later. *See* Lease Agreement, p.2, §1.2. No evidence has been introduced regarding

(15) No evidence was introduced that the parties ever submitted this matter to arbitration as mandated in the Lease Agreement. Further, the parties freely admit that there has not been any attempt to arbitrate.[11]

(16) The Lease Agreement next provides that in arriving at the adjusted rent every three (3) years, the parties should consider the following:

> The rent as adjusted shall be equal to fifteen percent (15%) percent [sic] of the fair market value of the leased land, exclusive of the improvements on the premise. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.

(Lease Agreement, p. 3, §1.3(b)).

(17) The evidence at trial established that the parties have never followed the provisions contained in the Lease Agreement to effectuate an adjustment in the rent.

(18) Finally, the Lease Agreement provides that "if the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined." (Lease Agreement, p. 3, §1.3(b)).

(19) Richard Faulkner, Quail Ridge's designated representative at trial, testified that Quail Ridge has paid rent, annually, in the original and unadjusted amount of $9,562.50 and is current on its annual obligation.

---

[11]When the Court inquired of the parties concerning this matter they both advised the Court that they were waiving this requirement of the Lease Agreement. The Court relied upon what the Court determined to be a mandatory arbitration provision when it granted PMC's motion requesting that Quail Ridge be denied its jury demand.

(24) Finally, the 1996 Estoppel Certificate provides that the "Landlords consent to the Sublease as set forth herein shall not constitute or be construed as (a) a waiver or modification by Landlord of Tenant's duties or obligations under the Lease [Agreement], or (b) excuse Tenant's performance of any term or condition of the Lease [Agreement]." (1996 Estoppel Certificate, ¶10).

(25) No evidence was introduced that IHC attempted to proceed with the three (3) year annual rent adjustment in 1998 as referenced by the 1996 Estoppel Certificate.[14]

(26) Between 1996 and 2001 the relationship between the parties and Lease Agreement remained static. IHC was the Lessor, Sterling was the Lessee, and PMI was the Sub-tenant or Sub-Lessee. In 2001, the relationships changed.

(27) Sometime between 1996 and 2001, Sterling determined that it wanted to sell the building located on the leasehold and Sterling's principals wanted to be released from their personal guarantees associated with the financing of the building located on the leasehold. Likewise, PMI wanted to purchase this building.

(28) Richard Faulkner testified that for a number of reasons, not particularly germane to this litigation, in order to facilitate the transaction between Sterling and PMI wherein PMI would purchase the building located on the leasehold, a new entity was created. This entity was Quail Ridge Medical Investors (Quail Ridge). Quail Ridge then purchased the building located on the leasehold from Sterling and PMI continued on as a subtenant of Quail Ridge.

(29) Richard Faulkner testified that the transaction was complex and involved a number of parties (IHC, Sterling, Quail Ridge, PMI, and the Public Employee Retirement System of

[14]The only evidence introduced at trial regarding a demand by IHC or any of its successors in interest was in October of 2009 when PMC made a demand for a rent adjustment which led to the present controversy and litigation.

> Under the Lease [Agreement], the Tenant is obligated to pay rent at the rate of NINE THOUSAND FIVE HUNDRED AND SIXTY TWO DOLLARS AND FIFTY CENTS ($9,562.50) per annum. Rent has been paid through and including FEBRUARY 28, 2001.

(2001 Estoppel Certificate, ¶5). This provision contains two (2) dramatic alterations from the 1996 Estoppel Certificate. First the 1996 Estoppel Certificate states that Sterling (the Tenant) "is obligated to pay rent **currently** at the rate of ... $9,562.50 per annum." The term "currently" has been deleted from the 2001 Estoppel Certificate and reads Sterling (the Tenant) "is obligated to pay rent at the rate of ... $9,562.50 per annum." Further, while the 1996 Estoppel Certificate provides that "under Section 1.3(b) of the Lease [Agreement], the rent shall be adjusted on the next rent adjustment date"; this language is glaringly absent from the 2001 Estoppel Certificate.

(35) Richard Faulkner discusses, from his perspective and that of Quail Ridge, why the language of 2001 Estoppel Certificate differs from the 1996 Estoppel Certificate. At trial, the following dialogue occurred:

> Q. If you'll look at exhibit 228 [2001 Estoppel Certificate] again, going back to paragraph five, it says that "under the lease tenant is obligated to pay rent at the current rate of $9,562.50 per annum. The rent has been paid through and including February 28th, 2001."
>
> Now, the language talking about rent adjustment that appears in the '96 estoppel certificate is not in this certificate here?
>
> A. That's correct. I did not include it in the first draft.
>
> Q. And why was that left out?
>
> A. Because I had looked at what the parties had been doing since 1996, and for the five years that our group had been involved in the facility the rent adjustment mechanism had never been raised. And then I spoke with the folks from Sterling Development Group and understood that in the entire 13 years preceding our involvement no one had ever raised the section of the rent adjustment in order to increase or change the rent. So I wanted to confirm in the course of dealing that that had been waived.

Faulkner Trial Testimony, p. 165, LL.22-25, p. 166, LL.1-17.

(40) In 2009, shortly after PMC acquired and became successor in interest to the Lease Agreement, as part of its larger purchase of the hospital operated and known as Portneuf Medical Center, Don Wadle was asked to review the Lease Agreement. He was informed that a previous adjustment had not taken place and asked to determine the appropriateness of making an adjustment to the annual rent.

(41) Don Wadle determined that an adjustment to the annual rent would be appropriate and that there was a process in the Lease Agreement to obtain an adjustment.

(42) In 2009, PMC began the process of having the 4.25 acre leasehold appraised and following the appraisal PMC made Quail Ridge aware of its intent to increase the annual rent in accordance with the Lease Agreement.

(43) At trial Brad Janoush, a principal with Integra Realty Resources in Boise, Idaho testified regarding the market value of the 4.25 acres of property which is the subject of the Lease Agreement.

(44) Mr. Janoush was admitted to testify at trial as an expert real estate appraiser and consultant.

(45) Mr. Janoush opined, after discussing his methodology, that the 4.25 acres of property that are the subject of the leasehold had a value of $1,080,000 on January 27, 2007. He further testified that on January 27, 2010, the value of this 4.25 acre leasehold had declined in value from the January 27, 2007 date to $990,000.[17]

(46) Christian Joseph Anton (Anton) testified, by way of deposition introduced at trial, that he "assumed" that the $15,000 per acre figure utilized by the parties as the "fair market

[17]PMC has argued that the applicable modification date is January 23. The Court is not sure where this date comes from. The copy of the Lease Agreement admitted into evidence at trial reflects a signature date of January 27, 1983. However, the Lease Agreement itself provides that the applicable date for the rent adjustment is February 1. *See* Court's Findings of Fact Number 9 and footnote 10.

> affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.
>
> (2) Idaho Code §10-1202 provides as follows:
>
> Any person interested under a deed, will, **written contract** or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

[Bold Emphasis Added by the Court]

(3) Finally, Idaho Code §10-1203 provides as follows:

A contract may be construed either before or after there has been a breach thereof.

(4) Pursuant to the foregoing, the Court has authority and jurisdiction to declare the rights of PMC and Quail Ridge as the successors in interest to the Lease Agreement.

(5) In 1983, IHC and Sterling entered into a legally binding and valid Lease Agreement whereby Sterling leased 4.25 acres of property from IHC.

(6) PMC and Quail Ridge are the successors in interest to this Lease Agreement. PMC is the Lessor and Quail Ridge is the Lessee.

(7) In *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005), the Idaho Supreme Court discussed contract interpretation, in doing so it stated as follows:

> When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning. The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties, this Court must view the contract as a whole. If a contract is found ambiguous, its interpretation is a question of fact. Whether a contract is ambiguous is a question of law. A contract is ambiguous if it is reasonably subject to conflicting interpretations.

(8) This Court, upon review of the Lease Agreement concludes that section 1.3(b) of the

footnote 10 to the Court's Findings of Fact. Therefore, the Lease Agreement called for adjustments to the annual rent on the following dates:

February 1, 1986
February 1, 1989
February 1, 1992
February 1, 1995
February 1, 1998
February 1, 2001
February 1, 2004
February 1, 2007
February 1, 2010

It also calls for adjustments to the annual rent on the following prospective dates:

February 1, 2013
February 1, 2016
February 1, 2019
February 1, 2022

(13) No adjustment to the annual rent under the Lease Agreement was effectuated pursuant to the terms of the Lease Agreement between 1986 and 2010. Further, no party to the Lease Agreement even attempted to adjust the annual rent until September and October of 2009 when PMC attempted to invoke section 1.3(b) of the Lease Agreement to effectuate a modification in the annual rent amount.

(14) The Court concludes that the second paragraph of section 1.3(b) is clear and unambiguous. It provides the procedure whereby the rent adjustment process is implemented. It allows for the parties to negotiate and submit by way of "written agreement" their agreement concerning the "fair market value" of the 4.25 acre leasehold for the upcoming three (3) year adjustment period. This period in which the parties are to negotiate and arrive at an agreed upon "fair market value" of the 4.25 acre leasehold is to occur within ninety (90) days of rent adjustment date. If the parties are successful in this endeavor, their agreed upon value is "a conclusive determination ... of fair market value for the period to which the adjustment applies." If the parties

v. Rocky Mountain Rogues, Inc., 148 Idaho 503, 513, 224 P.3d 1092, 1102 (2009). "The determination of a parties' intent with respect to a contract provision 'is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.'" *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011).

(18) The Court concludes that "fair market value" is a term of art in the legal and real estate fields. *Black's Law Dictionary* defines fair market value as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." *Black's Law Dictionary*, Seventh Edition. In *Logan v. Grand Junction Associates*, 111 Idaho 670, 671, 726 P.2d 782 783 (Ct.App.1986), the Idaho Court of Appeals considered a case where the trial court applied a nearly identical definition of fair market value (the legal definition of fair market value is what a willing buyer would pay a willing seller). Although the Idaho Court of Appeals did not rule on the correctness of this definition, neither did it indicate that this was not the correct definition. Rather, it reversed the trial judge on the basis that the methodology it applied in arriving at fair market value was in error. Brad Janoush, PMC's real estate appraiser expert, testified that fair market value is an antiquated term that was created and used back in the 1980's. He testified that the term now used is "market value." He defined market value as "the property's most probable sales price." He further testified that although the term "fair market value" "is hardly ever used currently, [it] ... may be thought of as being synonymous with market value."

(19) The Court concludes that these two (2) definitions of market value and fair market value are consistent and appear to be manageable definitions for the rent adjustment provision of the Lease Agreement if standing alone. However, they are not left standing alone.

County, and forgotten in its entirety except at times when ownership changed hands. It appears that there was no course of dealing between IHC and Sterling as well as their successors dealing directly with the three (3) year adjustment provision. Christison's testimony seems to intimate that IHC never sought a rent adjustment because it determined that the value of the leasehold acreage had not increased in value. Therefore, an adjustment process would have resulted in no change in the annual rent or a decrease. However, good management practices and compliance with the Lease Agreement would have required that they advise Sterling that they did not believe the value of the leasehold justified an increase in rent rather than just ignoring or forgetting about the rent adjustment provision.

(23) As stated in *Beus v. Beus, supra,* under Idaho law the parties' intent is to be determined by the express language of the document and reviewing the document as a whole. This is an issue of law. If there are ambiguities, then it becomes a question of fact concerning the intent of the parties. In ascertaining that intent, the fact finder may consider extrinsic evidence touching upon the parties' intent. In this case, the Court is the finder of fact. In discerning the intent of the parties, by way of extrinsic or parol evidence, the Court can consider the circumstances under which the Lease Agreement was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings. *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011) (*Beus*).

(24) As stated and discussed above, there is almost no credible or relevant evidence on these issues. The Court, in researching this issue, can find no controlling case law in Idaho that discusses how the Court should proceed when the record is entirely lacking extrinsic evidence of prior course of dealings and/or the parties' original intent.

is that there were no course of dealing for the following reasons: (1) Sterling, and later Quail Ridge, had no incentive to seek a rent adjustment (in a manner of speaking if Sterling or Quail Ridge "rocked the boat" they had nothing to gain and only increased rent to lose if they initiated a rent adjustment under the Lease Agreement); (2) IHC and Bannock County, through poor management and/or having forgotten about the rent adjustment provisions, never sought a rent adjustment.[20]

(28) Therefore: (1) because there is no evidence to establish how the original fifteen thousand dollar per acre figure was reached; and (2) because there is no evidence to establish a course of dealing to establish what construction the parties intended to give to the language related to subsequent adjustments, the Court will disregard these provisions of the Lease Agreement.[21]

(29) The Court will apply the current market value to the 4.25 acres of property which make up the leasehold. The Court accepts Janoush's opinion with respect to the current market value of the 4.25 acres, exclusive of improvements, as of February 1, 2007 as being $1,080,000. The Court further accepts Janoush's opinion with respect to the current market value of the 4.25 acres, exclusive of improvements, as of February 1, 2010 as being $990,000.

(30) In 2009, when PMC attempted to invoke section 1.3(b) of the Lease Agreement for purposes of modifying the annual rent, PMC had become the successor in interest to the original

[20]Again the Court recognizes that Christison testified that he reviewed all of IHC's executor contracts and that during his tenure no increase in rent was sought because he believed that the value in the property was not there to support a rent increase. While this may be an accurate state of affairs during Christison's tenure at IHC, 1989 through 2000; as Janoush's testimony established, in recent years, this area, east of I-15, has become a hot-bed of commercial development in Pocatello, Idaho. For these reasons, the Court concludes that there is no course of dealing with respect to IHC and Bannock County in their capacity as lessors due solely to mismanagement and the fact that the provisions of the Lease Agreement were forgotten on two (2) occasions in 1983 after the Lease Agreement was created and in 1996 after IHC agreed to PMI becoming a subtenant.

[21]Certainly these factors may play a role in future rent adjustments under the Lease Agreement, but there is no evidence in the record to allow them to play a role in the adjustment process this Court is being asked to consider as part of the declaratory judgment proceeding. For example, if the parties were, by written agreement, able to agree to rent adjustment that was based on a value less than 15% of market value as that term was defined by Janoush or *Black's Law Dictionary*, that would certainly be a relevant course of dealing evidence going forward.

> (1961). As with all modifications, the terms of a contract cannot be altered by one party without the other party's approval. *Id.* at 296, 362 P.2d at 386. Additionally, the minds of the parties must meet as to the proposed modification. *Id.* "The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of a change proposed by the other." *Id.* Whether an alleged modification is proven "is one for the trier of the facts to decide." *Res. Eng'g, Inc. v. Siler*, 94 Idaho 935, 938, 500 P.2d 836, 839 (1972).

This Court, as the finder of fact, determines that the evidence at trial does not support a finding by this Court of a modification to the terms of the Lease Agreement. Both the 1996 Estoppel Certificate and the 2001 Estoppel Certificate recite as follows:

> The Lease [Agreement] is in full force and effect, is valid and enforceable in accordance with its terms and has not been terminated. The Lease constitutes the only agreement of any kind or nature between the Landlord and the Tenant relating in any way to the Demised Premises.

1996 Lease Agreement, ¶2 and 2001 Lease Agreement, ¶2. Both the 1996 Estoppel Certificate and the 2001 Estoppel Certificate also provided as follows:

> Landlord's consent to the Sublease as set forth herein shall not constitute or be construed as (a) a waiver or modification by Landlord of Tenants duties or obligations under the Lease [Agreement], or excuse Tenants performance of any term or condition of the Lease [Agreement], or (b) a waiver or modification by Landlord to any rights, under the Lease [Agreement], including without limitation, Landlords right pursuant to Section 12.1 of the Lease Agreement.

1996 Estoppel Certificate, ¶10, and 2001 Estoppel Certificate, ¶10.

(35) The only evidence in the record regarding the modification of the Lease Agreement is the subjective intent of Faulkner. Faulkner testified as the individual drafting the 2001 Estoppel Certificate that he purposefully left out certain language that existed in the 1996 Estoppel Certificate because he "wanted to confirm in the course of dealing that that had been waived." The Court would suggest that removing language that was present in an earlier document and not discussing the same or making the other party aware of its deletion does not establish "mutual assent." In fact, some might question the propriety of such conduct. The Court finds that this unilateral act of

(38) The Idaho Supreme Court recently addressed the doctrine of waiver in *Knipe Land Co. v. Robertsen*, 151 Idaho 449, 457-58, 259 P.3d 595, 603-04 (2011). In doing so, it stated as follows:

> "A waiver is a voluntary, intentional relinquishment of a known right or advantage, and the party asserting the waiver must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment." *Fullerton v. Griswold*, 142 Idaho 820, 824, 136 P.3d 291, 295 (2006) (internal quotation omitted). "Waiver is foremost a question of intent." *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct.App.1987). A clear intention to waive must be shown before waiver shall be established. *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993). "Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." *Id.*

(39) As the Court previously ruled with respect to Quail Ridge's claim of contract modification, the Court, as the finder of fact, finds no facts to support the claim that IHC or Bannock County voluntarily and intentionally waived a known right. Rather, what the Court has found is that IHC and Bannock County, through poor management and oversight, neglected and/or forgot about the rent adjustment provision of the Lease Agreement. Such conduct does not establish the requisite intent to voluntarily waive the rent adjustment provision of the Lease Agreement.

(40) Finally, Quail Ridge asserts that the Court should apply the equitable doctrine of laches to the rent adjustment provisions and not allow PMC to modify the rent either retroactively or prospectively. The Court will accept Quail Ridge's laches defense in part and finds it to be inapplicable in part.

(41) In *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002), the Idaho Supreme Court discussed the defense of laches. In addressing this affirmative defense, the Supreme Court noted that the party asserting the defense bears the burden of proving

Agreement until October of 2009. This was two (2) years and over seven (7) months into the current rent adjustment period. This was not reasonable, nor was it compliant with the express provisions of the Lease Agreement, nor was it reasonable to expect Quail Ridge to have its annual rent adjusted two (2) years and seven (7) plus months into the current period.

(44) However, the Court does not find the same impediments to a prospective rent adjustment. In October of 2009, PMC notified Quail Ridge that it was seeking to adjust the rent in accordance with section 1.3(b) of the Lease Agreement. The Court concludes that this was consistent with the intent of obtaining a written agreement within the ninety (90) window set by section 1.3(b) of the Lease Agreement. These attempts were unsuccessful, and in June of 2010 litigation was initiated. The Court does not believe the doctrine of laches applies to PMC's attempts to effectuate a rent adjustment for the 2010 rent adjustment period as well as future rent adjustment periods. The Court concludes that although both parties failed to comply with the mandatory arbitration provision of the Lease Agreement, that PMC has complied with the provisions of the Lease Agreement sufficient to justify an adjustment to the annual rent.

(45) Therefore, the Court concludes that PMC is entitled to an adjustment in the rent for the years 2010, 2011, and 2012 in the amount of $148,500.00 annually. Therefore, for the three (3) year period applicable to the 2010 rent adjustment, the combined annual rent for these three (3) years is $445,500.00 by January 31, 2013, assuming that Quail Ridge remains current on its annual rent, it will have paid $28,687.50 towards the annual rent for this three (3) year period. As such it is entitled to a credit in this amount against the $445,500.00. This credit results in Quail Ridge being obligated to PMC in the total amount of $416,812.50 for rent for the period of February 1, 2010 through January 31, 2013.

CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that on the ~~16th~~ 17th day of October, 2012, she caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Memorandum Decision and Order to be served upon the following persons in the following manner:

PLAINTIFF ATTORNEY:
Kent L. Hawkins
P.O. Box 991
Pocatello, Idaho 83204-0991

- ☒ Faxed
- ☐ Hand Delivered
- ■ Mailed

DEFENDANT ATTORNEY:
Michael D. Gaffney
2105 Coronado State
Idaho Falls, Idaho 83404

- ☒ Faxed
- ☐ Hand Delivered
- ■ Mailed

DALE HATCH, Clerk

Brandy Peck, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH
JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, LLC, Defendants.	ORIGINAL NO: CV-10-2724 OC

Cleveland, Tennessee
April 11, 2012

DEPOSITION OF FORREST L. PRESTON

APPEARANCES:

FOR THE PLAINTIFF:

KENT L. HAWKINS, ESQ.
Merrill & Merrill, Chartered
109 North Arthur, 5th Floor
P. O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2286
(Appearing via Skype)

FOR THE DEFENDANTS:

MICHAEL D. GAFFNEY, ESQ.
Beard, St. Clair, Gaffney, P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404
(208) 557-5203
(Appearing via Skype)

ALSO PRESENT: Richard D. Faulkner, Jr., Esq.
Richard J. McAfee, Esq.
Joanna Crooks
Aaron Webb, Esq.

EXHIBIT
3
60 of 447

I N D E X

- - -

The deposition of Forrest L. Preston, a witness called at the instance of the Plaintiff, for purposes of discovery/use in evidence, pursuant to the Idaho Rules of Civil Procedure, taken by agreement on the 11th day of April, 2012, at Life Care Centers of America, 3001 Keith Street, NW, Cleveland, Tennessee, before Beth Ann Pell, Court Reporter and Notary Public.

S T I P U L A T I O N S

It is agreed that Beth Ann Pell, Court Reporter and Notary Public, may swear the witness, report his deposition in machine shorthand, and afterwards reduce the same to typewriting.

All objections, except as to form of the questions, are reserved until the time of trial.

It being further agreed that all formalities as to notice, caption, certificate, and transmission, et cetera, and the reading and signing of the completed deposition by the witness, are expressly waived.

- - -

FORREST L. PRESTON,

called as a witness at the instance of the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. HAWKINS:

Q My name is Kent Hawkins. I'm one of the three attorneys representing the Pocatello Medical Center in this case. If the witness would please state your full name for the record.

A Forrest L. Preston.

Q And what is your, what is your address there?

A Business address?

Q Business would be fine.

A Okay. 3001 Keith, K-E-I-T-H, Street, Cleveland, Tennessee.

Q All right. Tell me a little -- and let's just briefly -- a little bit about yourself starting with -- well, we're hearing it in a little different order. I understand there's two corporations in this suit. I'm going to -- if I refer to them as Quail Ridge and Century Park, is it clear to you of the two entities that I'm speaking of?

A Yes.

Q And do you hold positions in both of these corporations?

A Yes.

Q What are -- what is your position in each, each of those companies?

A Quail Ridge is the ownership entity of the actual building itself and operation. Century Park is a management company that I formed about six years ago with my youngest son, Bryan.

Q So when you say that you formed Century Park, are you the sole owner of Century Park?

A I share an ownership with my youngest son, Bryan, yes.

Q I missed that. Who do you share ownership with?

A My youngest son, Bryan. B-R-Y-A-N.

Q Just the two of you?

A Yes.

Q All right. Would the same be true of Quail? Who are the owners of Quail?

A I have not reviewed that recently, but I believe that I am a 99 percent owner, and there is a one percent ownership of which --

By the way, our video went off here, so I don't know if that's meaning -- can you still hear

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,

Plaintiff,

vs.

QUAIL RIDGE MEDICAL INVESTORS, LLC, and CENTURY PARK ASSOCIATES, LLC,

Defendants.

Case No. CV-10-2724 OC

DEPOSITION OF JODI THOMAS

Thursday, April 12, 2012, 1:00 p.m.

Pocatello, Idaho

Lanice M. Lewis

DEPOSITION OF JODI THOMAS

BE IT REMEMBERED that the deposition of JODI THOMAS was taken by the attorney for the plaintiff at the office of MERRILL & MERRILL, located at 109 North Arthur, Pocatello, Idaho, Lanice M. Lewis, Court Reporter and Notary Public, in and for the State of Idaho, on Thursday, April 12, 2012, commencing at the hour of 1:00 p.m., in the above-entitled matter.

APPEARANCES

For the Plaintiff:
MERRILL & MERRILL, CHTD
BY: R. WILLIAM HANCOCK
109 North Arthur, 5th Floor
Post Office Box 991
Pocatello, Idaho 83204-0991
(208) 232-2286

For the Defendant:
BEARD ST. CLAIR GAFFNEY
BY: MICHAEL D. GAFFNEY
2105 Coronado Street
Idaho Falls, Idaho 83404
(208) 557-5210

Also Present:
Tyler Neill

EXAMINATION

JODI THOMAS Page

April 12, 2012 1:00 p.m.

(The following deposition proceeded as follows:)

JODI THOMAS,

produced as a witness at the instance of the Plaintiff was sworn, examined, and testified as follows:

MR. HANCOCK: And let the record reflect that this is the deposition of Jodi Thomas, and it's the time and place that was set by a prior notice of deposition.

EXAMINATION

BY MR. HANCOCK:

Q. Will you please state your full name for the record, Jodi.

A. Jodi Dawn Thomas.

Q. And spell your last name.

A. T-H-O-M-A-S.

Q. And I asked you before we went on the record if I could call you Jodi during the deposition. Is that okay?

A. Absolutely.

Q. Jodi, have you ever had your deposition taken before?

EXHIBIT 11 64 of 447

SHEET 2 PAGE 5

A. Yes.
Q. Okay. So you know that there's a few rules that apply here. I'm going to review those, if that's okay, just to --
A. Sure.
Q. -- to make sure that we make a good record for the court reporter, and we make it easier for her to do her job.
First, as you know, everything that we're saying today is being taken down by the court reporter. That's important because in normal everyday conversation, Jodi, we have a tendency to speak over each other.
We anticipate what the other person is going to say, and then we immediately respond. During the deposition, we need to slow it down a little bit so that the court reporter can make a complete record because she can only take down one person at a time.
So that means I'll have to be patient and make sure that you're done answering your question before you -- I start -- answer my question before I go on to a next question. And I'd ask that you please make sure that I've completed my question before you start answering, even if you think you

PAGE 6

know what I'm about to ask. Is that okay?
A. Sure.
Q. Another thing is that everything that happens here today has to be verbal. So sometimes we want to nod our heads in everyday conversation. Here you'll need to give verbal responses. And if you think a question lends itself to a yes/no answer, I'd ask that you please just use yes or no. Because if you do uh-huh or uh-uh, that's hard to tell on the record sometimes. Okay?
A. Okay.
Q. The next thing, Jodi, is if I ask a question that you don't understand, my question makes no sense to you, please just tell me that, and I'll try to reword it so that it makes sense.
A. Okay.
Q. Otherwise, if you go on and answer, I'm going to assume that you understood what I was asking. Okay?
A. Okay.
Q. You indicated that you'd had your deposition taken before. When was the last time you had your deposition taken?
A. The one and only time was about a month ago, I think.

PAGE 7

Q. And was that in another legal matter?
A. It had to do with residents in our community fighting over an estate that we were pulled into.
Q. Okay.
A. I guess I'm just lucky.
Q. Yes.
Other than conversations that you may have had with your legal counsel, Jodi, what steps have you taken to prepare for your deposition today?
A. None.
Q. Okay. You haven't reviewed any documents?
A. I did review three letters and some fax -- I mean, some e-mail strands, I guess you call them.
Q. Okay. What letters in particular did you review?
A. Three letters from Portneuf Medical Center.
Q. And you --
A. They were -- they were addressed to me --
Q. Okay.
A. -- and Quail Ridge. And then an e-mail

PAGE 8

strand from Dod- -- Don Wadley and myself.
Q. Now, were these letters and e-mails going back to October of 2009 and early --
A. Yes.
Q. -- 2010?
A. Yes.
Q. Okay. Now, Jodi, as I understand it, you actually work -- or at least on your e-mails, it shows you working for an entity named Quail Ridge Assisted Living; is that correct?
A. Correct.
Q. How is that related to Quail Ridge Medical Investors, LLC?
A. We are -- we operate the building. Quail Ridge Medical Investors is the company, the management company.
Q. And so is Quail Ridge Assisted Living wholly owned and operated by Quail Ridge Medical Investors?
A. Yes.
Q. Okay. When did you start working for Quail Ridge?
A. December of 2003 -- I take that back. Well, for Quail Ridge, yes, December of 2003. I've been with the company longer, but for Quail Ridge,

SHEET 3 PAGE 9

December of '03.
Q. Okay. What makes you say you've been with the company longer?
A. I started out at our community in Twin Falls Bridge View Estates as director of sales and marketing before taking the promotion as GM to Quail Ridge in '03. So I -- yeah.
Q. So you came to the facility here in Pocatello, the Quail Ridge facility in Pocatello, in December of 2003?
A. Correct.
Q. And you mentioned GM. Is that the only title that you've had here?
A. At Quail Ridge, yes.
Q. Okay. What are your job responsibilities as the general manager?
A. I basically manage the daily operations of the community. Oversee everything that takes place in every department.
Q. Sure. Where, if any, of the organization of Quail Ridge Medical Investors do you fit, Jodi?
A. I run the community. It's -- the company owns and operates 45 buildings in 28 states, 21 states. And so I -- we have a GM in each

PAGE 10

community across the country, and we manage the daily operations and then report to our corporate offices for any major decisions.
Q. Okay. Whom do you directly report to with Quail Ridge?
A. Cody Tower is my regional director of operations, and he's out of Salt Lake City, Utah.
Q. How do you spell Cody's last name?
A. T-O-W-E-R.
Q. I didn't want to assume anymore --
A. First name, C-O-D-Y.
Q. And he's a regional manager out of Salt Lake City?
A. Yes.
Q. Jodi, how old were you in January of 1983?
A. January of 1983, I would have been 13, I guess, because I was 18 in '88, so. . .
Q. So it's fair to say, then, that you were not involved in any way with the drafting of this ground lease?
A. Absolutely not.
Q. Okay. Do you personally know any of the participants who were involved in the drafting of this ground lease at issue in this lawsuit back in

PAGE 11

January of 1983?
A. No, I do not.
Q. Have you spoken to any of the participants involved with drafting this ground lease back in January of 1983?
A. No, I have not.
Q. Is it fair to say, then, Jodi, that you have no personal knowledge regarding the drafting of this ground lease back in January of 1983?
A. Yes, that's fair.
Q. And specifically, is it fair to say that you have no personal knowledge concerning the rent adjustment language that was included in that ground lease?
A. Yes.
Q. Jodi, do you claim or believe that the rent adjustment provisions of the 1983 lease agreement was ever orally modified by any parties to the agreement?
A. Not that I'm aware of.
Q. Do you claim that any other written document modifies the rent adjustment provisions of the 1983 ground lease?
A. Again --
MR. GAFFNEY: I'm going to object. Her

PAGE 12

opinion is not relevant.
BY MR. HANCOCK:
Q. You can go ahead and answer.
A. Not that I'm aware of.
Q. You had indicated, Jodi, that you looked at this correspondence back from -- well, e-mail strains back from October of 2009 and then letters from the hospital to you at Quail Ridge after that period and in to early 2010; is that --
A. Yes.
Q. -- correct?
So you're familiar with those documents as you sit here today?
A. Yes.
Q. Were you the main contact person for the hospital at that time?
A. I was the local contact, yes.
Q. And so was it typical for the hospital to contact you with anything related to this lease?
A. We had never had any communication prior to that, other than business, talking to doctors and nurses as far as admissions go, so. . .
Q. And is that -- was that your experience, then -- I think you said you started in December of 2003 --

FILED
BANNOCK COUNTY
CLERK OF THE COURT
13 FEB 25 PM 2:32
BY
DEPUTY

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION FOR STAY, and alternatively, REQUEST FOR BOND**

COMES NOW the Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC") by and through its attorneys of record, Merrill & Merrill, Chtd., and for its objection to Defendants' Motion for Stay, respectfully states as follows:

ARGUMENT

I. The court should allow PMC to proceed to obtain judgment and collect such judgment.

PMC brought the present action to enforce the Amended Declaratory Judgment entered by Judge Brown in Bannock County Case No. CV-2010-2724 (the "declaratory judgment"). That Judgment declared the amount of past due rent owed by Quail Ridge during the last 3 years but

stopped short of issuing a money judgment for the amount due, finding instead that there can be no breach of contract until the amount of rent had been declared.[1] Despite the declaratory judgment ordering that rent was immediately due, Quail Ridge did not pay the rent.[2] This suit was filed to obtain a money judgment for the unpaid rent, so that collection could proceed for the amount declared due in the declaratory judgment. Thus, this action is premised entirely on Judge Brown's *Findings of Fact, Conclusions of Law and Memorandum Decision and Order* and his *Amended Declaratory Judgment.*

This action is, however, a new and separate breach of contract claim which has arisen since Judge Brown's ruling in the declaratory judgment. Quail's failure to immediately pay the unpaid adjusted rents for the prior 3 years as required by the 1983 Ground Lease Agreement is a new and current breach of its obligations under the ground lease. Furthermore, this action involves a new party, Forrest L. Preston. Preston executed a *Guaranty in Payment and Performance* ("2001 Personal Guaranty"), wherein Preston personally guaranteed Quail's performance and payment under the 1983 Ground Lease Agreement.[3] Despite a written demand being made upon Preston to pay the adjusted rents that Quail had failed to pay,[4] Preston has not responded,[5] nor has he paid the rent declared by Judge Brown as currently due and owing.[6] Preston's failure to pay the rent is a new and ongoing breach of his obligations to PMC under the 2001 Personal Guaranty.

PMC is concerned about whether it can collect from Quail and/or Preston. Quail is a Tennessee Limited Liability Company leasing land in Pocatello, Idaho.[7] Preston is an individual

---

[1] *See Amended Declaratory Judgment*, dated November 25, 2012 (Bannock County Case No. CV-2010-2724-OC; Mitchell W. Brown, District Judge), attached as Exhibit 2 to PMC's *Complaint*.

[2] *See* Affidavit of Don Wadle, at ¶ 2.

[3] *See Guaranty in Payment and Performance*, attached as Exhibit 1 to PMC's *Complaint*.

[4] *See* November 27, 2012 Letter, attached as Exhibit 1 to Affidavit of Counsel.

[5] *See* Affidavit of Counsel, at ¶ 3.

[6] *See* Affidavit of Don Wadle, at ¶ 3.

[7] *See Findings of Fact, Conclusion of Law and Memorandum Decision and Order*, dated October 16, 2012 (Bannock County Case No. CV-2010-2724-OC; Mitchell W. Brown, District Judge), at p. 10, ¶¶ 2-4, attached as Exhibit 2 to Affidavit of Counsel ("Memorandum Decision"); *see also* Deposition of Forrest L. Preston, at pp.3-4, attached as Exhibit 3 to Affidavit of Counsel.

residing in and primarily doing business out of Tennessee.[8] Defendant Quail's primary interest in Pocatello, Idaho, is the leasehold that is at issue in this action.[9] Given Defendants' minimal connections to Pocatello, Idaho, PMC is reasonably concerned that it will be without adequate protection should it not be allowed to quickly proceed to a money judgment in the present action and further be allowed to immediately collect on such money judgment.

In contrast, it is without dispute that PMC is a Delaware Limited Liability Company whose principal place of business is 651 Memorial Drive, Pocatello, Idaho.[10] It is further without dispute that in addition to owning the 4.25 acre leased premises at issue in this action,[11] PMC owns and operates its hospital located in Pocatello, Idaho.[12] Given PMC's substantial connection to and presence in Pocatello, Idaho, this Court should recognize that Defendants will have sufficient protection with this court to obtain a refund of any judgment collected by PMC in this action should PMC not prevail on appeal.

Should PMC be allowed to proceed to and prevail on summary judgment in this matter, this Court should also allow PMC to immediately collect on any money judgment entered in this action. This Court should find, considering that PMC is allowing Quail to continue to occupy the leased premises , that Quail be required to pay the full amount of rent ordered by Judge Brown. Furthermore, based upon Defendants actions in this matter, PMC is reasonably concerned that these out-of-state Defendants will simply abandon the leased premises should Defendants not get the outcome they desire in the appeal.

---

[8] *See* Deposition of Forrest L. Preston, at pp.3-4, attached as Exhibit 3 to Affidavit of Counsel.

[9] *See* Memorandum Decision, at p. 10, ¶¶ 2-4; *see also* Deposition of Forrest L. Preston, at pp.3-4, attached as Exhibit 3 to Affidavit of Counsel; *see also* Deposition of Jodi Thomas, at pp. 8-10, attached as Exhibit 4 to Affidavit of Counsel

[10] *See* Memorandum Decision, at p. 10, ¶ 1.

[11] *See* Memorandum Decision, at p. 10, ¶ 3.

[12] *See* Memorandum Decision, at p. 20, ¶ 40.

II. In the alternative, the court should wait to stay the case until a judgment is obtained.

Typically, a case on appeal already has a judgment that becomes immediately enforceable if the appeal fails. PMC requests that it be allowed to do the same in this case and that it at least be allowed to obtain a money judgment so as to avoid any further delay after the appeal. This approach is the most efficient course for all the parties.

The parties agree that this case hinges on Judge Brown's declaratory judgment. Thus, if Judge Brown's rulings and judgment are upheld on appeal, Defendants are without legal argument or excuse in the present action. Alternatively, if Judge Brown's judgment is not completely upheld on appeal, then PMC will be without a basis for the current action. This simple reality clearly demonstrates that the present action is ripe for a summary judgment and should be quickly resolved by this Court with little additional expense to the parties.

Indeed, PMC is willing to quickly resolve the present action by entering into a stipulation with Defendants that a money judgment can be entered in the present matter based upon Judge Brown's Amended Declaratory Judgment with an understanding that the Judgment should be stayed until the conclusion of the appeal. PMC is further willing to stipulate with Defendants that the judgment is immediately enforceable if Judge Brown is upheld on appeal or, in the alternative, is void if Judge Brown's declaratory judgment is not upheld on appeal; subject to a bond, as discussed below.

The above described approach is not costly to either party and will greatly expedite the finalization of this dispute at the conclusion of the appeal in the declaratory judgment. Otherwise, if Defendants are not willing to stipulate to a judgment as outlined above, PMC should be allowed to immediately proceed to a summary judgment in this matter. Contrary to Defendants assertions in their motion, no depositions will be required to support such motion for summary judgment because the motion will be based primarily on the declaratory judgment. Allowing this case to proceed to summary judgment at this early stage will cost the parties a relatively minimal amount of additional expense at this point while it avoids the additional delay after the appeal of the declaratory judgment. If PMC is not allowed to immediately proceed to a summary judgment in

this matter, Defendants may be inclined, if their Answer and motion are any indication, to unnecessarily drag out this dispute between the parties for many months even if the Idaho Supreme Court decides in favor of PMC on the appeal. Such continued delay will be prejudicial and unfair to PMC.

Allowing the case to proceed to judgment brings the case to the same point at which an appeal is usually filed, which is after the money judgment is entered; the stay is merely to delay enforcement of the judgment during the appeal. There is no reason to not allow this case to go that far.

III. Either way, the court must order Quail and Preston to post a bond.

If the court chooses to allow the case to proceed to judgment, but to then stay collection of the judgment, the court should order a bond on the amount of the money judgment in this case, or on the amount declared due by Judge Brown in the declaratory judgment, which is the same amount. Even if this Court will not allow PMC to immediately collect on any money judgment it obtains in this action, this Court should recognize that it has broad discretion under I.R.C.P. 62(d) and I.A.R. 13(b)(14)-(15) to require the Defendants to post a supersedeas bond as a condition to granting any stay. Requiring the Defendants to post such a bond in this case will ensure that PMC is able to quickly collect on its judgment once Judge Brown's rulings and declaratory judgment are upheld on appeal.

CONCLUSION

For the reasons outlined above, this court should not stay the present action as requested by the Defendants, but rather should allow this action to proceed to a money judgment and allow PMC to collect the rent on the land being occupied by Quail. Alternatively, PMC should be allowed to proceed to obtain judgment, with an understanding that such money judgment will be stayed during the pendency of the appeal of the first case, subject to Defendants posting a bond for the amount of that judgment.

DATED this 25 day of February, 2013.

MERRILL & MERRILL, CHTD.

By _____
Kent L. Hawkins
Attorneys for Plaintiff, PMC

CERTIFICATE OF SERVICE

I, Kent L. Hawkins, the undersigned, one of the attorneys for the Plaintiff, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 25 day of February, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile

_____
Kent L. Hawkins

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 SEP 29 AM 9:41
BY
DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Defendants' Reply Memorandum in Support of Motion for Stay

The defendants (collectively Quail Ridge) through counsel of record, Beard St. Clair Gaffney PA, respectfully submit the following Reply Memorandum in Support of their Motion for Stay.

Introduction

The plaintiff, Pocatello Hospital LLC dba Portneuf Medical Center, LLC (PMC), acknowledges in its brief that the entire basis for its cause of action is the outcome of the prior case before Judge Brown. Thus, the validity of the breach of contract claim in this case depends on the outcome of the appeal in the other litigation. There is no dispute that a reversal by the

http://localhost:3080/pub/up.cgi?cmd=uInBoxEntry&Rec=r00001637&print=1 73 9/17/2013

Supreme Court of Judge Brown will nullify the demand sent by PMC. Thus, this Court should wait until the Supreme Court has decided the appeal before moving forward with this case.

PMC's request for a bond should be denied because (a) the cases where the bond should have been requested is prior case and (b) there is no obligation to secure against. A supersedeas bond secures against an owing obligation. Here, there has been no finding that Quail Ridge has breached the contract. Until there is such a finding, there is nothing to secure.

Argument

As noted in prior briefing, the present action is entirely premised on the validity of Judge Brown's findings of fact and conclusions of law in Bannock County Case No. CV-10-2724. Quail Ridge has appealed Judge Brown's findings and conclusions to the Idaho Supreme Court and challenges the validity and propriety of those findings. It is clear from the allegations in the complaint that PMC that the efficacy of this lawsuit is premised on the validity of the findings in the prior lawsuit. However, if the Idaho Supreme Court overturns Judge Brown's findings then the entire basis for the lawsuit will be undone. The current case will cease to exist and the action will be mooted. Thus, there is no sense in proceeding with this lawsuit until there is a decision from the Idaho Supreme Court in the appeal. Failing to stay this litigation would not accomplish the ends of judicial economy or a just and inexpensive resolution of the matter. *See* Idaho R. Civ. P. 1(a) (2012).

1 There is no basis for requiring a bond if the matter is stayed.

PMC has cited no authority that would require Quail Ridge to post a bond if the Court stays this matter. The rules cited by PMC do not apply to this case; instead, they apply to the prior case tried before Judge Brown. Judge Brown's findings, however, did not establish a breach of contract and did award PMC any relief upon which it could execute. The Court did not enter a

money judgment. The Court only granted declaratory relief and dismissed the breach of contract claim by PMC against Quail Ridge for the adjustment period at issue in this case. In short, there is no basis for requiring a supersedeas bond in this case. If a bond were to have been posted it should have been in association with the appeal to secure a money judgment. Since there was no money judgment awarded, the supersedeas bond requirement does not apply.

However, PMC never requested a bond be posted in the appeal because it has no money judgment. Rules 13(b)(14)-(15) apply only to appeals taken from a final judgment. This case is a separate lawsuit and is not an appellate proceeding. Rule 13(b)(14) applies to staying orders other than money judgments in association with an appeal and does not apply in this case. Rule 13(b)(15) applies to the stay of money judgments, which is clearly inapplicable because PMC lacks a money judgment in both cases.

PMC requests a bond because it wants to "quickly collect on its judgment" following the appeal. However, following the appeal PMC will still have to prove a breach of contract and obtain a judgment. There is no judgment upon which PMC may quickly collect. This matter will still have to proceed to trial and Quail Ridge will assert its defenses including res judicata and collateral estoppel. There is a significant amount of work that will need to be performed before PMC can even hope to acquire a judgment in this case. Quail Ridge has asserted several affirmative defenses that could preclude all collection activity by PMC. Such work will be unnecessary if the Supreme Court reverses Judge Brown.

2 PMC concedes that any cause of action is based on Judge Brown's findings.

In its briefing, PMC concedes that this entire case is premised on the validity of Judge Brown's findings of facts and conclusions of law. (Pl. Mem. at 2.) The outcome of the appeal is vital to ensuring that this case provides a consistent result. There is no way for the parties to

know whether the obligation being claimed by PMC is valid until the Supreme Court has ruled on Judge Brown's findings. Allow this case to proceed to judgment before the appeal has been decided risks an inconsistent result. It is also not the most efficient use of judicial resources. Waiting until the appellate decision saves the parties' time and resources that would be otherwise wasted. If Judge Brown is reversed, then the parties can deal with that information. If Judge Brown is affirmed, then the stay can be lifted and the parties may proceed with discovery, dispositive motions, and, if necessary, trial. It is only after the appeal is completed that the parties can know whether the entire lawsuit remains valid. Proceeding with this case now is premature and inconsistent with the ends of judicial economy.

3 Quail Ridge has valid affirmative defenses.

Quail Ridge has valid defenses in this case, primarily res judicata and collateral estoppel. PMC conveniently fails to disclose the fact that it previously sued Quail Ridge under a theory of breach of contract and damages for the 3-year adjustment period at issue in this case. PMC also does not disclose to the Court that PMC went to trial with that breach of contract claim pending, tried its case, and in response to a "directed verdict" motion, withdrew the breach of contract claim, and Judge Brown entered a directed verdict dismissing that claim. The issue of breach of contract was tried to the Court and PMC lost its breach of contract claim. Thus, regardless of the appeal, the validity of this collection action is disputed.

Thus, allowing PMC to file a motion for summary judgment will only incur costs that can and should be delayed until the appeal is resolved. Those costs may not even be necessary if the Supreme Court reverses Judge Brown. If they are necessary, then waiting until their necessity becomes clear prejudices no party in this litigation. The costs are deferred until the proper time when the parties know what issues, if any, remain following the appeal. Staying the present case

is more consistent with the principles of judicial economy and use of judicial resources than the course suggested by PMC.

Conclusion

As a result of the foregoing, the motion for stay should be granted and the request for a bond should be denied.

DATED: February 28, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on February 28, 2013, I served a true and correct copy of the DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR STAY on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Heard St. Clair Gaffney PA
Attorneys for Defendants

FILED
BANNOCK COUNTY
13 JUN 13 PM 4:25
BY DEPUTY

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **MOTION TO COMPEL**

COMES NOW the Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC, by and through its counsel of record, Merrill & Merrill, Chtd., pursuant to I.R.C.P. 7(b)(1), and hereby respectfully moves this Court for an order compelling the Defendants, Quail Ridge Medical Investors, LLC, and Forrest L. Preston, an individual, to comply with this Court's Order dated March 6, 2013. Specifically, in the Minute Entry and Order dated March 6, 2013, this Court granted Defendants' Motion to Stay pursuant to I.R.C.P. 62(b), "pending the posting of a bond by the Defendants in the amount of $416,812.50, the amount Judge Brown declared to be due."

More than three months have passed since the time this Court ordered Defendants to post a bond in the amount of $416,812.50 and Defendants have still failed to post such bond with the

Court. Plaintiff has attempted in good faith for several months to get the Defendants to comply with the requirements of the Court's March 6, 2013 Order and Defendants have still failed to post the bond ordered by the Court.

Plaintiff now respectfully requests this Court to order Defendants to post a bond within 5 days of the hearing of this Motion and for the court to further order Defendants to pay all of Plaintiff's attorney's fees associated with pursuing and bringing this Motion to Compel and for any such further relief the Court deems appropriate under the circumstances of this case.

This motion is made and based on the pleadings and documents on file with the Court as well as the affidavit submitted simultaneous herewith.

Oral argument is requested.

DATED this 12th day of June, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock
Attorneys for Plaintiff, PMC

CERTIFICATE OF SERVICE

I, Kent L. Hawkins, the undersigned, one of the attorneys for the Plaintiff, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 13th day of June, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney BEARD ST. CLAIR GAFFNEY PA 2105 Coronado Street Idaho Falls, Idaho 83404	[ ] U.S. Mail [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile
Judge Robert C. Naftz 624 E. Center, Rm. 220 Pocatello, ID 83201 (Chambers Copy)	[ ] U.S. Mail [ ] Hand Delivery [ ] Overnight Delivery [✓] Telefax 547-2147

for Kent L. Hawkins

FILED
12 JUN 13 PM 12:25
BY DEPUTY

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION TO COMPEL**

STATE OF IDAHO)
:ss
County of Bannock)

I, R. William Hancock, Jr., being first duly sworn on this oath, deposes and states as follows:

1. I am one of the attorneys for the Plaintiff in the above-captioned matter.

2. On March 6, 2013, the Court entered a Minute Entry and Order granting the Defendants' Motion to Stay, "pending the posting of a bond by the Defendants in the amount of $416,812.50.

3. A true and correct copy of the Court's March 6, 2013, Minute Entry and Order is attached hereto as Exhibit 1.

4. On March 12, 2013, Kent Hawkins, one of the attorneys for the Plaintiff in the above-captioned matter, sent correspondence to attorney Mike Gaffney, one of the attorneys for the Defendants, requesting that the bond be posted or a check deposited with the Court within 14 days of the court's ruling, which would have been March 20, 2013.

5. A true and correct copy of Mr. Hawkins' March 12, 2013 letter as is kept in the files of the Merrill & Merrill law firm is attached hereto as Exhibit 2.

6. On March 20, 2013, attorney Michael Gaffney responded to Mr. Hawkins' March 12, 2013, letter, stating: "With regard to the bond requirement in this matter, my client will most likely be posting a cash deposit with the clerk in the court and we will keep you apprised of the status of the deposit."

7. A true and correct copy of Mr. Gaffney's March 20, 2013, letter is attached hereto as Exhibit 3.

8. On or about April 10, 2013, I telephoned attorney John M. Avondet, one of the attorneys for the Defendant, inquiring about the status of the bond and stressing the need to timely get a bond deposited with the Court. This telephone conversation ended with Mr. Avondet advising me that he would check into the issue and get back with me on the status of the bond.

9. On or about April 12, 2013, I received an e-mail from attorney John M. Avondet, advising me that his client contact with regard to the bond issue, Rick McAfee, was out of the office until next week and, therefore, he did not "have an update on the bond issue yet."

10. A true and correct copy of Mr. Avondet's April 12, 2013, e-mail is attached hereto as Exhibit 4.

11. On that same date, I responded to Mr. Avondet thanking him for his e-mail and informing him that I would not "hassle [him] too much while [he] worked on an answer" concerning the bond so long as he could "just assure me that [he] will follow through on this issue."

12. Mr. Avondet wrote me back on that same date stating that he would follow-up on the bond issue.

13. A true and correct copy of these additional April 12, 2013, e-mail exchanges is attached hereto as Exhibit 5.

14. On or about April 26, 2013, Mr. Avondet e-mailed me stating the following: "I owe you a response to your inquiry Let me at least say that it is being worked on. We're exploring the option of depositing the required amount into a restricted account that would be FBO Quail Ridge and PMC, with restrictions being the funds can only be released upon proper court order or something to that effect. We're working on that portion. So, it's in progress."

15. A true and correct copy of Mr. Avondet's April 26, 2013, e-mail is attached hereto as Exhibit 6.

16. More than a month has passed since this last communication from Defendants' counsel and a bond still has not been posted nor has a cash deposit been lodged with the Clerk of the Court.

17. On or about June 10, 2013, I telephone attorney John Avondet and left him a voice mail message advising him that if his clients had not obtained a bond or made a cash deposit with the Clerk of Court by Thursday, June 13, 2013, then Plaintiff would file a motion to compel on this issue and seek attorney's fees associated within bringing such motion.

18. I followed-up that telephone message with a letter to the same effect, which letter was faxed to Mr. Avondet on that same date.

19. A true and correct copy of my June 10, 2013, letter along with the accompanying fax confirmation sheet is attached hereto as Exhibit 7.

DATED this 12th day of June, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock
Attorneys for Plaintiff, PMC

SUBSCRIBED AND SWORN TO before me this 12th day of June, 2013.

(SEAL) DEBORAH LAFANA NOTARY PUBLIC STATE OF IDAHO

Deborah Lafana
Notary Public for Idaho
Residing at: Pocatello, ID
My Commission Expires: 12-5-17

CERTIFICATE OF SERVICE

I, Kent L. Hawkins, the undersigned, one of the attorneys for the Plaintiff, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 13th day of June, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney BEARD ST. CLAIR GAFFNEY PA 2105 Coronado Street Idaho Falls, Idaho 83404	[ ] U.S. Mail [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile
Judge Robert C. Naftz 624 E. Center, Rm. 220 Pocatello, ID 83201 (Chambers Copy)	[ ] U.S. Mail [ ] Hand Delivery [ ] Overnight Delivery [✓] Telefax 547-2147

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,

Plaintiff,

vs.

QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual,

Defendants.

CASE NO. CV-2012-5289-OC

MINUTE ENTRY AND ORDER

This case came before this Court on March 4, 2013, for hearing on a Motion to Stay filed by the Defendants. The Plaintiff filed an Objection to Defendants' Motion for Stay, and alternatively, Request for Bond.

Counsel for the Plaintiff and the Defendants were present. The matter proceeded to hearing. After considering the parties' arguments and upon review of the file and the relevant law, this Court issued a ruling from the Bench.

This lawsuit arises from a dispute regarding the amount of rent owed by the Defendants under a Ground Lease Agreement executed on January 27, 1983. The amount of past due rent

EXHIBIT

was resolved by a declaratory judgment entered by the Honorable Mitchell W. Brown in Bannock County Case No. CV-10-2724. Pursuant to the Amended Declaratory Judgment entered in that case, Judge Brown determined that "Quail Ridge is obligated to promptly pay [Portneuf Medical Center] $416,812.50 under the terms of the parties' Ground Lease Agreement." (*See* Ex. 2, attached to Compl., Dec. 13, 2012.) Quail Ridge appealed.

The Plaintiff filed the current action in order to recover the amount stated to be due in the Amended Declaratory Judgment. The Defendants thereafter moved for a stay in this case pending the outcome of its appeal, arguing a stay is necessary because "[t]he present action is entirely premised on the validity of Judge Brown's findings of fact and conclusions of law in Bannock County Case No. CV-10-2724." (Defs.' Mem. in Supp. of Mot. to Stay, Feb. 7, 2013, 2.) The Plaintiff objected to the entry of a stay, but argued in the alternative that this Court should require the Defendants to post a supersedeas bond as a condition to granting any stay. The Plaintiff argued that "[r]equiring the Defendants to post such a bond in this case will ensure that PMC is able to quickly collect on its judgment once Judge Brown's rulings and declaratory judgment are upheld on appeal." (Pl.'s Reply to Defs.' Mot. to Stay, Feb. 25, 2013, 5.)

Following oral arguments, this Court granted the Motion to Stay pursuant to Rule 62(b)[1] of the Idaho Rules of Civil Procedure, pending the posting of a bond by the Defendants in the amount of **$416,812.50**, the amount Judge Brown declared to be due. Following the posting of

---

[1] Rule 62. Stay of proceedings.

...

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

an appropriate bond, this matter will be stayed pending the outcome of the appeal filed in Bannock County Case No. CV-10-2724.

IT IS SO ORDERED.

DATED this 6 day of March, 2013.

Robert C. Naftz

ROBERT C. NAFTZ
District Judge

Copies to:
Kent L. Hawkins
Michael D. Gaffney

DAVE R. GALLAPENT
KENT L. HAWKINS*
BRENDON C. TAYLOR
KENT A. HIGGINS*
JARED A. STEADMAN
R. WILLIAM HANCOCK
TYLER H. NEILL

*ALSO ADMITTED IN UTAH

MERRILL & MERRILL
CHARTERED
COUNSELORS AND ATTORNEYS AT LAW
109 N. ARTHUR - 5TH FLOOR
P.O. BOX 991
POCATELLO, IDAHO 83204-0991

A.L. MERRILL (1886-1961)
R.D. MERRILL (1893-1972)
W.F. MERRILL (1919-2005)

TELEPHONE:208-232-2286
FAX:208-232-2499

Founded in 1913

March 12, 2013

Sent Via Facsimile: 208-529-9732

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY, PA
2105 Coronado Street
Idaho Falls, ID 83404

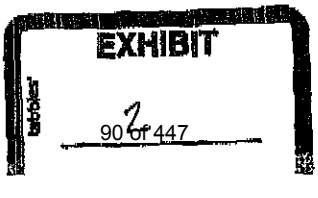
RE: *PMC v Quail Ridge Medical Investors, et al*
Bannock County Case No. CV-2012-5289-OC

Dear Mr. Gaffney:

We received the court's Minute Entry and Order today ordering Quail to post the bond in this matter. I realized that the court did not enclose a specific deadline on this. Please let me know when you expect to have the bond posted or a check deposited. It seems reasonable that this should be accomplished within 14 days of the court's ruling so it could be done by March 20. Please let me know if that is going to be a problem.

Sincerely,

Kent L. Hawkins
KLH/gs/5975



Beard St. Clair Gaffney
Attorneys

Michael D. Gaffney
2105 Coronado Street • Idaho Falls, ID 83404
Phone (208) 557-5203 • Fax (208) 529-9732
Assistant (Jessica) (208) 557-5223
Email gaffney@beardstclair.com
Admitted in Idaho, Wyoming & Oregon

LIFE MEMBER
MULTI-MILLION DOLLAR ADVOCATES FORUM
The Top Trial Lawyers in America

VIA FACSIMILE: (208) 232-2499

March 20, 2013

Kent L. Hawkins
Merrill & Merrill
PO Box 991
Pocatello, ID 83204-0991

RE: PMC v. Quail Ridge Medical Investors

Dear Kent:

I am in receipt of your March 12, 2013 letter. With regard to the bond requirement in this matter, my client will most likely be posting a cash deposit with the clerk of the court and we will keep you apprised of the status of the deposit.

Additionally, by complying with the Court's order requiring the posting of a bond, we are not acknowledging that the Court's pre judgment order is correct.

Sincerely,

Michael Gaffney

Enclosures as stated
cc: client

Attorneys licensed in Idaho Colorado Oregon Washington Wyoming Utah

Winston V. Beard	John G. St. Clair	Michael D. Gaffney	Gregory C. Calder	Dale P. Thomson	Jarin O. Hammer	Lance J. Schuster
Jeffrey D. Brunson	Dan C. Dimmar	Jared W. Allen	John M. Avondet	Michael W. Brown	Julie Stomper	Carrie J. Gorganz
Lindsay M. Lofgran	Harlow J. McNamara of Counsel	Gordon S. Thatcher of Counsel	Blair J. Grover of Counsel	E. Scott Lee of Counsel		

EXHIBIT
91 of 447

William Hancock

From: John Avondet <javondet@beardstclair.com>
Sent: Friday, April 12, 2013 2:11 PM
To: William Hancock
Subject: 20130412 PMC v. Quail Ridge <To: QuailRidge_PMC>

I will follow up. But please understand that my ability to be responsive to you is dependent on others being responsive to me.

Have a good weekend.

JMA

John M. Avondet
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, ID 83404
Tel. (208) 557-5208
Fax (208) 529-9732
e-mail: javondet@beardstclair.com

This e-mail is sent by a law firm and contains information that may be privileged and confidential. If you are not the intended recipient, please delete the e-mail and notify us immediately.

IRS Rules of Practice require us to inform you that advice, if any, in this email (including any attachments) concerning federal tax matters is not intended to be used, and cannot be used or relied upon for the purpose of avoiding penalties under the Internal Revenue Code, nor for promoting, marketing or recommending any transaction or matter addressed herein.

From: William Hancock <bhancock@merrillandmerrill.com>
Date: Friday, April 12, 2013 2:11 PM
To: John Avondet <javondet@beardstclair.com>
Subject: RE: 20130412 PMC v. Quail Ridge <To: QuailRidge_PMC>

Thank you John. If you can just assure me that you will follow through on this issue, I will try not to hassle you too much while you work on an answer.

Thanks,

/s/

R. William Hancock, Jr.
Merill & Merrill, Chtd.
109 N. Arthur, 5th Floor
P.O. Box 991
Pocatello, ID 83204
P: (208) 232-2286
F: (208) 232-2499

EXHIBIT

bhancock@merrillandmerrill.com

From: John Avondet [mailto:javondet@beardstclair.com]
Sent: Friday, April 12, 2013 1:46 PM
To: bhancock@merrillandmerrill.com
Subject: 20130412 PMC v. Quail Ridge <To: QuailRidge_PMC>

Bill:

Rick McAfee is out of the office until next week. So unfortunately, I don't have an update on the bond issue yet. I will try and touch base with him early next week and get back to you.

Thanks.
JMA

John M. Avondet
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, ID 83404
Tel. (208) 557-5208
Fax (208) 529-9732
e-mail: javondet@beardstclair.com

This e-mail is sent by a law firm and contains information that may be privileged and confidential. If you are not the intended recipient, please delete the e-mail and notify us immediately.

IRS Rules of Practice require us to inform you that advice, if any, in this email (including any attachments) concerning federal tax matters is not intended to be used, and cannot be used or relied upon for the purpose of avoiding penalties under the Internal Revenue Code, nor for promoting, marketing or recommending any transaction or matter addressed herein.

EXHIBIT
93 of 447
5

William Hancock

From: John Avondet <javondet@beardstclair.com>
Sent: Friday, April 26, 2013 4:00 PM
To: William Hancock
Subject: 20130426 Bond Inquiry

Bill:

I owe you a response to your inquiry about the status of the bond. Let me at least say that it is being worked on. We're exploring the option of depositing the required amount into a restricted account that would be FBO Quail Ridge and PMC, with the restriction being the funds can only be released upon proper court order or something to that effect. We're working on that portion. So, it's in progress.

Best,
JMA

John M. Avondet | Attorney
2105 Coronado St | Idaho Falls, ID 83404
DIRECT (208) 557-5208 | MAIN (208) 523-5171

This e-mail is sent by a law firm and contains information that may be privileged and confidential. If you are not the intended recipient, please delete the e-mail and notify us immediately.

EXHIBIT
94 of 447

P. 01

TRANSACTION REPORT

JUN-10-2013 MON 04:54 PM

FOR: MERRILL & MERRILL 208 232 2499

SEND DATE START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
JUN-10 04:54 PM	12085299732	22"	1	FAX TX	OK	636	

TOTAL : 22S PAGES: 1

DAVE R. GALLAPENT
KENT L. HAWKINS*
BRENDON O. TAYLOR
KENT A. HIGGINS*
JARED A. STEARMAN
R. WILLIAM HANCOCK
TYLER H. NEILL

*ALSO ADMITTED IN UTAH

MERRILL & MERRILL
CHARTERED
COUNSELORS AND ATTORNEYS AT LAW
109 N. ARTHUR - 5TH FLOOR
P.O. BOX 991
POCATELLO, IDAHO 83204-0991

A.L. MERRILL (1886-1961)
R.D. MERRILL (1898-1972)
W.F. MERRILL (1919-2005)

TELEPHONE:208-232-2286
FAX:208-232-2499

Founded in 1919

June 10, 2013

Sent Via Facsimile: (208) 529-9732
John Avondet
Beard St. Clair
2105 Coronado Street
Idaho Falls, ID 83404

Re: PMC/Quail Ridge – 2013 Rent Adjustment
Bannock County Case No. CV-2012-5289

Dear John:

I am writing this letter in follow up to the voicemail that I left for you earlier today. Without having to make an in-depth recitation of our recent communications, suffice it to say that our firm has tried to work with you for several months now to have your client comply with the Court's Order in the above referenced matter by depositing the necessary funds as security for the stay entered by the Court. Even though your client was reminded of its obligation to comply with this Court's Order over two months ago, to the date of this letter no deposit has been made with the Court as required by Judge Naftz. We are beyond the point of wanting to discuss this matter further.

In the end, it is really quite simple. Your client has to comply with the Court's Order. Your client has not done so, and we will file a Motion to Compel on this issue by this Thursday, June 13, 2013. You can let your client know that we are not interested in any more clever ideas for half-hearted compliance with the Court's Order. Rather, we want strict compliance with the Court's Order. If such has not occurred by Thursday, June 13, 2013, we will promptly file our Motion to Compel. Your client should know that we will seek attorney fees related to this Motion to Compel. We believe that we are entitled to these attorney fees because we have tried in good faith for two months now to cooperatively work with your client to have it comply with the Court's Order.

If you have questions on any of this, please do not hesitate to contact me.

Sincerely,

MERRILL & MERRILL, CHTD.

*Sent without signature to avoid delay

R. William Hancock

EXHIBIT 7

DAVE R. GALLAFENT
KENT L. HAWKINS*
BRENDON C. TAYLOR
KENT A. HIGGINS*
JARED A. STEADMAN
R. WILLIAM HANCOCK
TYLER H. NEILL

*ALSO ADMITTED IN UTAH

MERRILL & MERRILL
CHARTERED
COUNSELORS AND ATTORNEYS AT LAW
109 N. ARTHUR - 5TH FLOOR
P.O. BOX 991
POCATELLO, IDAHO 83204-0991

A.L. MERRILL (1886-1961)
R.D. MERRILL (1893-1972)
W.F. MERRILL (1919-2005)

TELEPHONE:208-232-2286
FAX:208-232-2499

Founded in 1913

June 10, 2013

Sent Via Facsimile: (208) 529-9732
John Avondet
Beard St. Clair
2105 Coronado Street
Idaho Falls, ID 83404

Re: PMC/Quail Ridge – 2013 Rent Adjustment
Bannock County Case No. CV-2012-5289

Dear John:

I am writing this letter in follow up to the voicemail that I left for you earlier today. Without having to make an in-depth recitation of our recent communications, suffice it to say that our firm has tried to work with you for several months now to have your client comply with the Court's Order in the above referenced matter by depositing the necessary funds as security for the stay entered by the Court. Even though your client was reminded of its obligation to comply with this Court's Order over two months ago, to the date of this letter no deposit has been made with the Court as required by Judge Naftz. We are beyond the point of wanting to discuss this matter further.

In the end, it is really quite simple. Your client has to comply with the Court's Order. Your client has not done so, and we will file a Motion to Compel on this issue by this Thursday, June 13, 2013. You can let your client know that we are not interested in any more clever ideas for half-hearted compliance with the Court's Order. Rather, we want strict compliance with the Court's Order. If such has not occurred by Thursday, June 13, 2013, we will promptly file our Motion to Compel. Your client should know that we will seek attorney fees related to this Motion to Compel. We believe that we are entitled to these attorney fees because we have tried in good faith for two months now to cooperatively work with your client to have it comply with the Court's Order.

If you have questions on any of this, please do not hesitate to contact me.

Sincerely,

MERRILL & MERRILL, CHTD.

*Sent without signature
to avoid delay

R. William Hancock

FILED
13 JUL -1 PM 1:29
BY DEPUTY

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Defendants' Memorandum in Opposition to Motion to Compel

The defendants (collectively Quail Ridge) through counsel of record, Beard St. Clair Gaffney PA, respectfully submit the following Memorandum in Opposition to the Motion to Compel filed by the plaintiff, Pocatello Hospital, LLC dba Portneuf Medical Center, LLC (PMC).

Quail Ridge states that it is presently working on arranging for a deposit in the amount of the bond as contained in the Minute Entry and Order entered on March 6, 2013. Quail Ridge anticipates that this will be taken care of in the next few days and ideally before the hearing scheduled for July 8, 2013. There is no timeline designated for posting the bond and Quail

Ridge has, at all times, acted consistent with the Court's order even if it has been a few months since the hearing on Quail Ridge's request for a stay.

Quail Ridge objects to the request for attorney fees associated with filing the motion to compel. There has been no prejudice to PMC due to the bond issue. Its rights have in no way been abrogated because the issue. In short, there is no basis for imposing any sort of sanction or award of attorney fees and PMC cites no authority for its request in any regard.

DATED: July 1, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on July 1, 2013, I served a true and correct copy of the DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK CO.
2013 JUL 11 PM 2:54
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **MINUTE ENTRY & ORDER**

The Plaintiff's Motion to Compel came before this Court for hearing on the 8th day of July, 2013, with attorney R. William Hancock, Jr., appearing for the Plaintiff and attorney John Avondet appearing for the Defendants. Upon considering the Plaintiff's motion and Defendants' objection thereto, together with oral arguments made at the time of the hearing, and with the Court otherwise being fully informed in the premises of this case;

IT IS HEREBY ORDERED as follows:

1. Plaintiff's Motion to Compel is granted;
2. By 5:00 p.m. on July 22, 2013, the Defendants are required to either post a bond in the amount of $416,812.50 or to deposit with the Clerk of Court funds in the amount of $416,812.50;
3. If Defendants fail to timely post the bond or deposit the funds as outlined in Paragraph 2

immediately above, the stay previously entered by this Court will be automatically lifted at that time; and,

4. Defendants shall pay to Plaintiff all of its costs and attorney's fees associated with bringing Plaintiff's Motion to Compel. Plaintiff shall submit to the Court and serve on opposing counsel an affidavit outlining its costs and attorney's fees associated with its Motion to Compel.

DATED this 11 day of July, 2013.

Robert C. Naftz

Honorable Robert C. Naftz

CLERK'S CERTIFICATE OF SERVICE

The undersigned Clerk of Court, does hereby certify that a true, full and correct copy of the foregoing *Minute Entry & Order* was this 11 day of July, 2013, served upon the following in the manner indicated below:

John Avondet
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile

R. William Hancock
MERRILL & MERRILL, CHTD.
P. O. Box 991
Pocatello, Idaho 83204

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Facsimile

Deputy Clerk

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 SEP -5 PM 1:07
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC ("PMC"), by and through its counsel of record, Merrill & Merrill, Chtd., pursuant to I.R.C.P. 56(a), and hereby moves this Court for an Order granting summary judgment in favor of the Plaintiff as a matter of law. The grounds for this motion are set forth more particularly in a supporting brief and the supporting affidavits, which have been filed contemporaneously herewith pursuant to I.R.C.P. 56(c). Plaintiff requests oral argument on this motion.

DATED this 5th day of September, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock, Jr.
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiff in the above-referenced matter does hereby certify that a true, full and correct copy of the foregoing document was this 5th day of September, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney BEARD ST. CLAIR GAFFNEY PA 2105 Coronado Street Idaho Falls, Idaho 83404	[X] U.S. Mail [ ] Hand Delivery [ ] Overnight Mail [ ] Fax: (208) 529-9732
Honorable Robert E. Naftz 624 E. Center, Rm. 220 Pocatello, Idaho 83201 (Chambers Copy)	[X] U.S. Mail [ ] Hand Delivery [ ] Overnight Delivery [ ] Fax: (208) 236-7290

By _____
R. William Hancock, Jr.

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 SEP -5 PM 1:07
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to I.R.C.P. 56(c), the Plaintiff submits the following Brief in supports of its motion for summary judgment:

STATEMENT OF UNDISPUTED FACTS

This case arises from Quail Ridge Medical Investor's ("Quail Ridge") failure to pay Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC") adjusted rents for the 2010 rent adjustment period.

Specifically, on or about October 16, 2012, after a two day court trial, the Honorable Mitchell W. Brown issued his *Findings of Fact, Conclusions of Law and Memorandum Decision and Order* in Bannock County Case No. CV-2010-2724-OC ("Memorandum Decision").[1] The

[1] See generally, Findings of Fact, Conclusion of Law and Memorandum Decision and Order, dated October 16, 2012 (Bannock County Case No. CV-2010-0002724-OC; Mitchell W. Brown, District Judge) ("Memorandum Decision"),

primary issue before Judge Brown in Bannock County Case No. CV-2010-2724-OC was the interpretation of a January 27, 1983 Ground Lease Agreement ("Ground Lease")[2] to which PMC and Quail Ridge are successor lessor and lessee respectively.[3]

Among the issues that Judge Brown was asked to consider in his interpretation of the Ground Lease and subsequent documents was whether PMC was entitled to adjust rents for the 2010 Rent Adjustment Period outlined in the Ground Lease and, if so, what that adjusted rental rate should be. As to these specific issues, Judge Brown concluded in relevant part:

> PMC is entitled to an adjustment in the rent for the years 2010, 2011, and 2012 in the amount of $148,500.00 annually. Therefore, for the three (3) year period applicable to the 2010 rent adjustment, the combined annual rent for these three years is $445,500.00 by January 31, 2013, assuming that Quail Ridge remains current on its annual rent, it will have paid $28,687.50 toward the annual rent for this three (3) year period. As such it is entitled to a credit in this amount against the $445,500.00. This credit results in Quail Ridge being obligated to PMC in the total amount of $416,812.50 for rent for the period of February 1, 2010 through January 31, 2013.[4]

On or about November 26, 2012, Judge Brown entered an Amended Declaratory Judgment in that case consistent with his findings. This Amended Declaratory Judgment states that "Quail Ridge is obligated to promptly pay PMC $416,812.50 under the terms of the parties' [January 27, 1983] Ground Lease Agreement."[5] The Amended Declaratory Judgment entered by Judge Brown in Bannock County Case No. CV-2010-0002724-OC is a determination of the amount of adjusted rent that Quail should have paid during the 2010 Rent Adjustment Period.

Upon receipt of this Amended Declaratory Judgment, Quail Ridge had the following contractual responsibility under Section 1.3(b) of the Ground Lease:

* * * *

---

attached as Exhibit 1 to Affidavit of Counsel filed simultaneous herewith.

[2] Id.

[3] Id. at p. 12, ¶¶ 5-7.

[4] Id. at p. 36, ¶ 45.

[5] See Amended Declaratory Judgment, dated November 26, 2012 (Bannock County Case No. CV-2010-0002724-OC; Mitchell W. Brown, District Judge) ("Amended Declaratory Judgment"), attached as Exhibit 2 to Affidavit of Counsel filed simultaneous herewith.

If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.[6]

* * * *

Quail Ridge has not paid to PMC the $416,812.50 determined by Judge Brown to be due and owing for the 2010 Rent Adjustment Period.[7] By failing to promptly pay these outstanding adjusted rents for the 2010 Rent Adjustment Period after a determination of such rents was made by Judge Brown, Quail Ridge is in breach of its obligations under the Ground Lease.

PMC, as the successor in interest to IHC for this hospital property, is the successor guarantee, beneficiary, of a certain *Guaranty in Payment and Performance* ("Personal Guaranty") executed by Forrest Preston ("Preston"), an individual, on or about June 1, 2011.[8] As guarantor, Preston personally guarantees payment and performance of any and all of Quail's obligations under the Ground Lease.[9] Even though on November 27, 2012, PMC made written demand on Quail Ridge and Preston for payment of the $416,812.50 in outstanding adjusted rents for the 2010 Rent Adjustment Period,[10] Preston has not personally paid to PMC these outstanding adjusted rents.[11]

In its November 27, 2012 demand letter to Quail Ridge and Preston, PMC notified both parties that if the outstanding balance of $416,812.50 was not paid within ten (10) days of the date of the letter, then PMC would proceed with this breach of contract action.[12] Despite such written demand and notice, neither Quail Ridge nor Preston has paid to PMC the adjusted rents for the

---

[6] See Ground Lease Agreement, dated January 27, 1983 ("Ground Lease"), at p. 3, Section 1.3(b), attached as Exhibit 4 to Affidavit of Counsel.

[7] See Affidavit of Don Wadle.

[8] See *Guarantee in Payment and Performance*, dated June 1, 2011 ("Personal Guaranty"), attached as Exhibit 3 to Affidavit of Counsel; *see also* Memorandum Decision, at p. 19, ¶ 37, attached as Exhibit 2 to Affidavit of Counsel.

[9] See Personal Guaranty, attached as Exhibit 3 to Affidavit of Counsel; *see also* Memorandum Decision, at p. 19, ¶ 37, attached as Exhibit 2 to Affidavit of Counsel.

[10] See Letter dated November 27, 2012, attached as Exhibit5 to Affidavit of Counsel filed simultaneous herewith.

[11] See Affidavit of Don Wadle.

[12] Id.

2010 rent adjustment period.[13]

A comparison of the Defendants' Answer in this present action and Judge Brown's Memorandum Decision reveals that the Defendants are raising the same affirmative defenses in this action as has already been raised and adjudicated by Judge Brown in Bannock County Case No. CV-2010-0002724-OC.

STANDARD OF REVIEW

Under Idaho law, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[14] Whether a fact is material depends on the substantive law of the case.[15]

Although the initial burden of establishing the absence of a genuine issue of material fact rests with the moving party, once that burden has been met, the burden shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of fact.[16] Under Idaho law, the nonmoving party may not simply rest upon the mere allegations or denials in the pleadings.[17] Instead, the nonmoving party must come forward with specific facts showing that there is a genuine issue of fact to be resolved at trial.[18]

If there is an absence of evidence on a dispositive issue for which the nonmoving party bears the burden of proof, then the nonmoving party must "go beyond the pleadings and by . . . affidavits, or by the deposition, answers to interrogatories, and admissions on file, designate

---

[13] See Affidavit of Don Wadle.

[14] IRCP 56(c). *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000).

[15] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[16] Smith v. Meridian Joint School Dist. #2, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996).

[17] IRCP 56(e); Baxter, 135 Idaho at 170, 16 P.3d at 267; *Meridian Joint School Dist. #2*, 128 Idaho at 719, 918 P.2d at 588.

[18] Id.

specific facts showing that there is a genuine issue for trial."[19] Summary judgment is mandated against the nonmoving party who thereafter fails to present sufficient evidence to establish a genuine issue of fact for trial.[20]

Finally, a nonmoving party's case must be anchored in something more solid than mere speculation or conjecture.[21] A mere scintilla of evidence is not enough to create a genuine issue of material fact.[22] There is no issue for trial unless there is evidence favoring the nonmoving party which is sufficient for a jury to return a verdict in favor of that party. If the evidence is "merely colorable, or is not significantly probative, summary judgment may be granted."[23]

ARGUMENT

Summary judgment in favor of PMC is appropriate in this case because there are no genuine issues of material fact that: (1) by failing to promptly pay the adjusted rent for the 2010 Rent Adjustment Period determined by Judge Brown in Bannock County Case No. CV-2010-0002724-OC, Quail has breached its obligations under the Ground Lease; (2) By failing to pay Quail Ridge's outstanding obligations under the Ground Lease, Preston is in breach of his obligations under the Personal Guaranty; and, (3) Defendants are collaterally estopped from raising their affirmative defenses in the present action because such defenses were already raised by Quail Ridge in Bannock County Case No. CV-2010-0002724-OC and have been decided by Judge Brown after a full evidentiary hearing on the issues.

I. By failing to promptly pay the adjusted rent for the 2010 Rent Adjustment Period determined by Judge Brown in Bannock County Case No. CV-2010-0002724-OC, Quail has breached its obligations under the Ground Lease.

Despite Quail Ridge's attempts to murky the waters, this breach of contract case is really quite simple and straight forward. It is governed by the following language found in Section

---

[19] Celotex Corp. v. Catrett, 477 U.S. 317, 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotations and citation omitted).

[20] Id. at 322, 324-25.

[21] Edwards v. Conchemco, Inc., 111 Idaho 851, 853, 727 P.2d 1279, 1281 (Ct. App. 1986).

[22] Id.

[23] Anderson, 477 U.S. at 249-50 (citations omitted).

1.3(b) of the Ground Lease:

* * * *

If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.[24]

* * * *

There is no doubt or confusion in this case that Judge Brown's Amended Declaratory Judgment entered on November 26, 2012, was a determination of the adjusted rents for the 2010 Rent Adjustment Period. Indeed, after finding in his Memorandum Decision that PMC was entitled to a rent adjustment in 2010 and that the amount of the adjusted rents still owing for that rent adjustment period was $416,812.50, Judge Brown entered an Amended Declaratory Judgment wherein he declared that "Quail Ridge is obligated to promptly pay PMC $416,812.50 under the terms of the parties' Ground Lease Agreement."[25]

Under Section 1.3(b) of the Ground Lease, once the determination of adjusted rents was made for the 2010 Rent Adjust Period, Quail Ridge was then obligated to "promptly after the determination, pay any difference for the period affected by the adjustment." In this case, Judge Brown declared that the difference was $416,812.50 and, therefore, Quail Ridge was required to promptly pay that amount to PMC.

More than 9 months has now passed since Judge Brown declared the adjusted rental amount for the 2010 Rent Adjustment Period and Quail Ridge has still not paid the outstanding adjusted rents due and owing to PMC. By failing to promptly pay this amount, Quail Ridge has breached its Ground Lease with PMC. This Court should find that Quail Ridge is in breach of the Ground Lease and thereafter enter a summary judgment against Quail Ridge and in favor of PMC in the amount of $416,812.50, plus PMC's costs and attorney's fees associated with brining this breach of contract action.

To the extent that it is anticipated that Quail Ridge will argue that it did not pay the

---

[24] See Ground Lease, at p. 3, Section 1.3(b), attached as Exhibit 4 to Affidavit of Counsel. It is worth noting that Judge Brown found in Bannock County Case No. CV-2010-0002724-OC that this specific paragraph in Section 1.3(b) of the Ground Lease contained clear and unambiguous language as to the parties' respective rights and obligations under the Ground Lease.

[25] See Amended Declaratory Judgment,, attached as Exhibit 2 to Affidavit of Counsel filed simultaneous herewith.

$416,812.50 to PMC because it is appealing Judge Brown's Declaratory Judgment, this Court should first recognize that the tenant's agreement with a declared adjusted rent amount is not a condition precedent under Section 1.3(b) before the tenant is obligated to pay the adjusted amount. Further, this Court should take judicial notice of the fact that it temporarily stayed this present action at Quail Ridge's request on the condition that Quail Ridge pay the $416,812.50 declared by Judge Brown as currently due and owing into the Court during the pendency of the stay. Not only did Quail Ridge fail to deposit the necessary funds as ordered by the Court, but then Quail again refused and failed to deposit the necessary funds or submit the necessary bond even after the Court gave it additional time to do so. Under these circumstances, this Court should have little sympathy in this case with Quail Ridge's failure to abide by the clear and unambiguous terms of the Ground Lease even in light of Quail Ridge timely appealing Judge Brown's decision. Quail Ridge was given an opportunity to secure these funds and stay this action during the pendency of the appeal and it elected to not take the necessary steps to do so. As such, it should now be subject to a judgment against it for its failure to pay the outstanding adjusted rents for the 2010 Rent Adjustment period.

II. By failing to pay Quail Ridge's outstanding obligations under the Ground Lease, Preston is in breach of his obligations under the Personal Guaranty.

Once Quail Ridge failed to promptly pay the adjusted rents for the 2010 Rent Adjustment Period as it was required to do under the Ground Lease, Preston became personally liable for the outstanding rents in the amount $416,812.50. Under the clear and unambiguous terms of the Personal Guaranty executed by Preston, he personally guaranteed payment and performance of any and all of Quail Ridge's obligations under the Ground Lease, including but not limited to Quail Ridge's obligation to pay rent.[26] Once Quail Ridge failed to promptly pay the adjusted rents for the 2010 Rent Adjustment Period after the determination of those rents was made by Judge Brown, Preston became personally responsible to pay such outstanding adjusted rents. It is undisputed in this case that Preston has not paid the outstanding adjusted rents for the 2010 Rent Adjustment Period even though demand was made upon him to do so. Because he has not

[26] See Personal Guaranty, attached as Exhibit 3 to Affidavit of Counsel; see also Memorandum Decision, at p. 19, ¶ 37, attached as Exhibit 1 to Affidavit of Counsel.

personally paid the $416,812.50 in outstanding adjusted rents now due and owing to PMC, Preston is in breach of his personal guaranty and summary judgment against him personally is appropriate in this case.

As discussed in this previous section of this Brief, Preston was given an opportunity to either deposit the necessary funds with the court or post a bond to stay this present action. Even when the Court gave Preston, as a defendant to this action, additional time to either deposit the necessary funds or post an appropriate bond and stay the action, Preston elected not to do so. In light of this case history, the Court should find no issue with enforcing the clear and unambiguous terms of the Ground Lease against Quail Ridge and the Personal Guaranty against Preston even if such Defendants disagree with Judge Brown's interpretation of the Ground Lease and Declaratory Judgment. There is no clause in either of these agreements which state that either party has to agree with a declaration of adjusted rents before they become liable to pay such rents. Rather, the Ground Lease is clear that once such declaration is made, Quail Ridge, as tenant, was obligated to promptly pay the amount of outstanding rents for the adjusted Period to PMC, as landlord, Similarly, the Personal Guaranty is clear that if Quail Ridge fails to fulfill its obligations under the Ground Lease, PMC, as landlord, is allowed to look to Preston to personally fulfill Quail Ridge's obligations. Both defendants have failed to fulfil their contractual obligations to PMC in this instance and, therefore, a grant of summary judgment against both defendants is appropriate at this time.

III. Defendants are collaterally estopped from raising their affirmative defenses in the present action because such defenses were already raised by Quail Ridge in Bannock County Case No. CV-2010-0002724-OC and have been decided by Judge Brown after a full evidentiary hearing on the issues.

Under Idaho law, the doctrine of res judicata covers both claim preclusion, sometimes referred to as true res judicata, and issue preclusion, sometimes referred to as collateral estoppel.[27] While claim preclusion bars a subsequent action between the same parties upon the same claim or claims "relating to the same action . . . which might have been made,"[28] issue preclusion protects

[27] Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803.805 (2002).

[28] Id.

litigants from litigating an identical issue with the same party or the party's privy.[29] Separate tests are used to determine whether claim preclusion or issue preclusion applies.[30]

In this case, the doctrine of claim preclusion, a.k.a. collateral estoppel, applies to bar the affirmative defenses raised by the Defendants in this action. A comparison of the Defendants' Answer in this present action and Judge Brown's Memorandum Decision reveals that the Defendants are raising the same affirmative defenses in this present action as has already been raised by Quail Ridge in the prior action and adjudicated by Judge Brown. Under Idaho's well established law, the Defendants are collaterally estopped from raising those same affirmative defenses in this subsequent action.

Whether collateral estoppel bars the relitigation of issues adjudicated in a prior action between the same party or a the party's privy is a question of law for the court.[31] Idaho courts have found that five questions must be answered in the affirmative before the collateral estoppel doctrine can be applied: (1) did the party against whom the earlier decision is asserted have a full and fair opportunity to litigate that issue in the earlier case?; (2) was the issue decided in the prior litigation identical with the one presented in the action in question?; (3) was the issue actually decided in the prior litigation?; (4)was there a final judgment on the merits; and (5) was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[32]

All five requirements for collateral estoppel are satisfied in this case. First, a review of Judge Brown's Memorandum Decision demonstrates that Quail Ridge and, therefore, its principal, Forest Preston, were given a full and fair opportunity to litigate their affirmative defenses in Bannock County Case. No. CV-2010-0002724-OC. Indeed, the Memorandum Decision reveals that Defendants were provided an opportunity to present any evidence in support of their affirmative defenses at trial.

---

[29] Rodriguez v. Dep't of Corr., 136 Idaho 90, 92, 29 P.3d 401, 403 (2003).

[30] D.A.R. Inc. v. Sheffer, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000).

[31] Richardson v. Four Thousand Five Hundred Forty-Three Dollars, U.S. Currency, 120 Idaho 220, 222, 814 P.2d 952, 954 (Ct. App. 1991), citations omitted.

[32] Id., 120 Idaho at 223, 814 P.2d at 955 (citing Accord Anderson v. City of Pocatello, 112 Idaho 176, 183-84, 731 P.2d 171, 178-79 (1987)).

Second, a comparison between Defendant's Answer in the present case and Judge Brown's Memorandum Decision in the prior case clearly reveals that the issues decided in Bannock County Case No. CV-2010-0002724-OC are identical with the ones presented in the present action. Both cases revolve around the 1983 Ground Lease Agreement that governs the rights and responsibilities of the parties. The Defendants' allegations of modification, waiver, lack of a meeting of the minds, lack of real party in interest, failure to join necessary and indispensable parties, laches, and unenforceability in the present action are the exact same issues that were raised and adjudicated by Judge Brown in Bannock County Case. No. CV-2010-0002724-OC. Also, there can be no doubt that consideration and adjudication of these defenses was necessary for Judge Brown to issue his final declaratory judgment in that prior case. As such, under the doctrine of collateral estoppel, Judge Brown's final decision is conclusive on these issues and Defendants are precluded from relitigating these same identical issues in the present action.

Third, a review of Judge Brown's Memorandum Decision reveals that these defenses were actually decided in Bannock County Case. No. CV-2010-0002724-OC. Because these affirmative defenses have been previously heard, considered, and decided by Judge Brown, they cannot be relitigated in the present action.

Fourth, it is undisputed that there was a final judgment on the merits in Bannock County Case. No. CV-2010-0002724-OC. This Court has not only been provided a copy of Judge Brown's Memorandum Decision, but it has also been presented with Judge Brown's Amended Declaratory Judgment in that action, which judgment is consistent with his Memorandum Decision. Indeed, it is this Memorandum Decision that gives right to the present breach of contract claim against these defendants.

Finally, it is undisputed that Quail Ridge was a party to the prior action. Although Preston was not a named party to the prior action, it is undisputed that Preston is the primary principal of Quail Ridge. Indeed, when Preston was deposed during the discovery phase of Bannock County Case. No. CV-2010-0002724-OC, Preston testified that he is a ninety-nine percent (99%) owner of Quail Ridge.[33] Because Preston was the principal owner of Quail Ridge during the litigation of Bannock County Case. No. CV-2010-0002724-OC, there can be no doubt for purposes of the

[33] See Forest L. Preston Deposition Transcript, at 4:20-23, attached as Exhibit 6 to Affidavit of Counsel filed simultaneous herewith.

present analysis that Preston was in privity with Quail Ridge during the litigation and trial of the prior action. Because Preston was and still is in privity with Quail Ridge at all times material hereto, this Court should find that Preston is barred by the doctrine of collateral estoppel from raising affirmative defenses in the present action that were already resolved against his company, Quail Ridge, in Bannock County Case No. CV-2010-00002724-OC. Such a finding in this case would certainly support the policy behind this doctrine which is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial recourses, and, by preventing inconsistent decisions, encourage reliance on adjudication."[34]

CONCLUSION

Because the undisputed evidence in this case establishes that both Defendants are in breach of their respective agreements governing their relationship with the Plaintiff, PMC, this Court should enter summary judgment in favor of PMC. Similarly, because the evidence before the Court demonstrates that the affirmative defenses raised by the Defendants in the present action are the same defenses raised by the Defendants and conclusively decided by Judge Brown in Bannock County Case No. CV-2010-00002724-OC, this Court should find that, as a matter of law, these defenses are barred by the doctrine of collateral estoppel. Because there are no issues of law or fact remaining in this case, this Court should grant summary judgment in favor of PMC.

DATED this 5th day of September, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock
Attorneys for the Plaintiff

[34] See Richardson, 120 Idaho at 222, 814 P.2d at 954 (citing United States v. Mendoza, 464 U.S. 154, 158, 104 S.Ct. 568, 571, 78 L.Ed.2d 379 (1984)).

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiff in the above-referenced matter does hereby certify that a true, full and correct copy of the foregoing document was this 5th day of September, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Fax: (208) 529-9732

Honorable Robert E. Naftz
624 E. Center, Rm. 220
Pocatello, Idaho 83201
(Chambers Copy)

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Fax: (208) 236-7290

R. William Hancock, Jr.

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 SEP -5 PM 1:07
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
:ss
County of Bannock)

I, R. William Hancock, Jr., being first duly sworn on this oath, deposes and states as follows:

1. I am one of the attorneys for the Plaintiff in the above-captioned matter and make the statements herein of my own personal knowledge and belief.

2. Attached hereto as Exhibit 1 is a true and correct copy of Findings of Fact, Conclusions of Law and Memorandum Decision and Order, CV-2010-2724-OC, dated October

16, 2012.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Amended Declaratory Judgment, CV-2010-2724-OC, dated November 26, 2012.

4. Attached hereto as Exhibit 3 is a true and correct copy of the Guarantee in Payment and Performance, dated June 1, 2011.

5. Attached hereto as Exhibit 4 is a true and correct copy of the 1983 Ground Lease Agreement, dated January 27, 1983.

6. Attached hereto as Exhibit 5 is a true and correct copy of Plaintiff's demand letter to Quail Ridge and Preston, dated November 27, 2012.

7. Attached hereto as Exhibit 6 is a true and correct copy of the cover page, and page 4 of Forest L. Preston's deposition transcript.

Further your affiant saith naught.

DATED this 5th day of September, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock
Attorneys for Plaintiff, PMC

SUBSCRIBED AND SWORN TO before me this 5th day of September, 2013.

_____
Notary Public for Idaho
Residing at: Pocatello, ID
My Commission Expires: 12-5-17

(SEAL) DEBORAH LAFANA
NOTARY PUBLIC
STATE OF IDAHO

CERTIFICATE OF SERVICE

I, R. William Hancock, the undersigned, one of the attorneys for the Plaintiff, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 5th day of September, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile

Judge Robert C. Naftz
624 E. Center, Rm. 220
Pocatello, ID 83201
(Chambers Copy)

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Telefax 547-2147

R. William Hancock

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2012 OCT 17 PM 12:50
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

******

POCATELLO HOSPITAL, LLC, dba PORTNEUF MEDICAL CENTERS, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, Defendants.	) Case No.	CV-2010-0002724-OC
	FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM DECISION AND ORDER	

This action came before the Court for a two (2) day court trial commencing on May 14 and continuing through May 15, 2012. The Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC (PMC) was represented at trial by counsel, Kent L. Hawkins and R. William Hancock. Defendants, Quail Ridge Medical Investors, LLC (Quail Ridge) and Century Park Associates, LLC (Century Park) were represented by Michael D. Gaffney and John M. Avondet. At the conclusion of trial, the Court set forth a post-trial briefing schedule. The parties agreed to share the cost associated with the preparation of a transcript of the trial in advance of post-trial briefing. *See* Minute Entry and Order entered on May 17, 2012. The Court entered an order regarding remitting payment to the Court Reporter and preparation of the transcript of the trial. *See* Order entered on June 5, 2012. The parties were instructed to submit post-trial arguments along with their proposed findings of fact and conclusions of law. There were four (4) depositions which were submitted to the Court for its review as part of the trial record. Pursuant to stipulation of the

EXHIBIT
120 of 447

process contemplated by the Lease Agreement. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 3. PMC also requested that the Court enter summary judgment in its favor and declare that Quail Ridge owed PMC back rent for the years 2007 through 2011 in the amount of $735,187.50 and rent in the sum of $148,500.00 for 2012. *Id.* at p. 5. PMC argued that this result was justified under the clear and unambiguous language of the parties' Lease Agreement. Quail Ridge also filed a counter-motion for summary judgment. Quail Ridge argued that the Court should deny PMC's motion for summary judgment and grant summary judgment on its behalf. Quail Ridge argued that in 2001, "the ability to adjust rent was removed from the parties' agreement." Defendants' Motion for Summary Judgment, p. 1. The Court denied both parties' motions for summary judgment finding that the parties' Lease Agreement contained ambiguities that would require extrinsic evidence concerning the parties' intent, specifically as it related to Article I, section 1.3(b) of the Lease Agreement.

Numerous pre-trial motions were filed in anticipation of trial. Two (2) of these are procedurally significant. The first was PMC's Motion to Amend Complaint and the second was PMC's Motion to Enforce Jury Waiver Clause in 2001 Landlord Consent and Estoppel Certificate. PMC's Motion to Amend Complaint was granted without objection by Quail Ridge. *See* Defendants' Notice of Non-Opposition to Plaintiff's Motion to Amend Complaint. The Court likewise granted PMC's Motion to Enforce the Jury Waiver Clause in 2001 Landlord Consent and Estoppel Certificate.[3]

PMC's Amended Complaint sought damages that were not requested in the original Complaint, based upon an updated appraisal. The Amended Complaint also asserted a claim for

[3]Quail Ridge, in its initial Answer, demanded a jury trial as required by Rule 38 of the Idaho Rules of Civil Procedure. It also made a jury demand in its Answer to the Amended Complaint. PMC's Motion to Enforce Jury Waiver was granted by the Court on grounds different than argued by PMC, but was nonetheless granted and the Court ordered that the trial would proceed to the Court rather than the jury. The basis for this determination was set forth in detail on the record on May 4, 2012.

2. Deposition Testimony - Guy P. Kroesche.[4]

PMC submitted the deposition of Guy P. Kroesche (Kroesche) as part of its case on rebuttal. PMC submitted the following with regard to Kroesche's testimony: (1) During Quail Ridge's cross-examination of Kroesche the following question was asked:

> Okay. But you would agree that that language could have been easily inserted in the 2001 and 2002 estoppel certificates as it had been in the 1996 certificate, right.

Depo. Kroesche, p. 34, LL.11-14. The propounded question does require a yes or no response. Further, Kroesche's response is non-responsive. Instead, he explains that typically estoppel certificates are not identical from transaction to transaction. However, Kroesche fails to respond to the specific question, that being that certain language could have easily been inserted in the 2001 and 2002 estoppel certificates just as it had been in the 1996 certificate. Quail Ridge moved to strike this response as non-responsive. *Id.* at p. 35, LL. 10-11. PMC argues Kroesche was entitled to explain his reasons for not being able to answer "yes" or "no." The Court will **SUSTAIN** Quail Ridge's objection and find that Kroesche's answer was non-responsive and will strike the same.[5]

PMC also addresses an objection made by Quail Ridge during PMC's re-direct examination as being beyond the scope of Quail Ridge's cross-examination. This exchange centered on the following questions:

> First of all, there was a question about whether if there had been a modification to the 1983 Ground Lease Agreement, would it have been included in the estoppel certificate. Can you answer that?

---

[4]PMC withdrew any of the objections to questions asked by Quail Ridge during Kroesche's deposition. PMC's Objections to Deposition Testimony, p. 3. Therefore, the Court will address only those issues raised by PMC in PMC's Objections to Deposition Testimony.

[5]The Court has crossed through that portion of Kroesche's response which has been stricken by the Court. *See* original Kroesche deposition at p. 34, LL.15-25, p. 35, LL.1-6. The same question is re-asked on p. 37 of Kroesche's deposition when he is asked "you could have, when you prepared the '01 estoppel certificate and the '02 estoppel certificate, or when you were reviewing them, inserted language like that found in the 1996 estoppel certificate related to the rent adjustment provision, correct?" The response was "[y]es, I could have put many different words in this estoppel certificate ... including I could have written that [referring to the language from the 1996 estoppel certificate] in as well." This response will be **ADMITTED** over the objections of counsel as stated in the deposition.

PMC next argues that Quail Ridge's objection to the following question, on leading grounds, should be overruled because the question is not leading:

> [a]t any time did you ever promise or make a representation to a Quail Ridge representative, or representatives from the Pocatello Medical Investors that you would waive or limit the rights under the 1983 contract to limit or increase the rent provision – the amount of rent under that agreement?

Goodwin Depo. p. 18, LL.15-21. The Court will **OVERULE** this objection and allow the answer to stand.[7] The Court concludes that this question is not leading because it does not suggest the answer.

Quail Ridge reasserts all of the objections made during the course of Goodwin's deposition. The only objection asserted by Quail Ridge that has not been addressed above is its objection, on the ground of lack of foundation, to the following question:

> What I want to know is if during the period from 1983 to 2003 you were aware of this adjustment provision in the 1983 Ground Lease Agreement.

Goodwin Depo., p. 15, LL.18-21. The Court will **OVERRULE** this objection. The question asked if Goodwin was aware of the adjustment provision found in the Lease Agreement. He answers that he "was not specifically aware of this arrangement." The Court will allow this answer. Obviously Goodwin lacks foundation to answer any further questions about the so called "adjustment provision" of the Lease Agreement based upon his admission, but he certainly can testify to what he testified in response to this question.

[7]Goodwin's answer to this question was "no, sir." However, Goodwin then adds this unsolicited response "In fact, in paragraph 5 of that document, the last sentence of that paragraph says, 'Rent has been paid through and including February 28, 1996. Under Section 1.3(b) of the lease, the rent shall be adjusted on the next rent adjustment date, March 1, 1999 – 1998.'" This response is non-responsive and will be **STRICKEN** by the Court. PMC's question was limited in scope to whether Goodwin ever made any promises or representations to Sterling or Quail Ridge. The question called for a yes or no response. Goodwin's "no, sir" response will be allowed; the balance is non-responsive and will be struck. The Court has crossed through the stricken portion of the testimony in the original deposition of Goodwin.

Id. at p. 6, LL.16-18. Again, Quail Ridge objects on the basis that the question assumes facts not in evidence, lack of foundation of the witness to answer, and speculation.

The Court will **OVERRULE** both objections. The answers are really of no evidentiary value. Anton responds generally that he is sure that he would have seen the Lease Agreement and the reason he believes this is that he was the CEO of PMC from 1981 through 1984. Anton Depo., p. 5, LL.10-11. This is sufficient foundation to take the matter out of the realm of speculation. Further, the Lease Agreement is in evidence. The balance of Anton's deposition establishes that he has little or no recollection, surrounding the Lease Agreement or the facts or circumstances leading to its creation.

Quail Ridge next objects to the following question and answer:

> Q. Do you know what involvement he [Gerald Olson] had, if any, in the drafting of this Agreement?
>
> A. I do not, but he may have drafted the Agreement.

Id. at p. 7, LL.6-8. Quail Ridge objects to this response as being non-responsive. The Court will **OVERRULE** as it relates to Anton's response that he does not know what involvement Olson may have had in drafting the Lease Agreement. The balance of the answer and the objection based upon non-responsiveness will be **SUSTAINED.** The balance of this response is speculative and apparently beyond Anton's personal knowledge and/or recollection. Therefore, it will be **STRICKEN.**[8]

Next, Quail Ridge objects to the following exchange on the basis of vagueness, lack of foundation, and assumes facts not in evidence:

> Q. Do you have any recollection of that language in this Agreement at all from 1983?

[8]The Court has crossed through the portion of this response that has been stricken in the original deposition on file with the Court.

that the call of the question, seeking Anton's understanding as the CEO of what specific language meant, is suggestive of an answer. It is therefore, overruled on leading grounds. The Court has previously found that adequate foundation has been laid, establishing Anton's status as CEO at the time the Lease Agreement was entered and created, to allow him to testify regarding his recollection of this Lease Agreement and the circumstances surrounding its creation. Therefore, the objection is overruled on the foundation objection. Finally, the Court overrules on the speculation basis. Although Anton is being asked to recall matters that occurred nearly thirty (30) years ago, that will go to weight. To the extent he remembers the circumstances surrounding the creation of the Lease Agreement, his testimony will stand.

FINDINGS OF FACT

To the extent that any of the Court's Findings of Fact are deemed to be Conclusions of Law, they are incorporated in the Court's Conclusions of Law.

(1) PMC is a Delaware Limited Liability Company authorized to do business in the state of Idaho. PMC's principal place of business is 651 Memorial Drive, Pocatello, Idaho. Amended Complaint, p. 1, ¶1, Answer to Amended Complaint, p. 1, ¶1.

(2) Quail Ridge is a Tennessee Limited Liability Company authorized to do business in the state of Idaho. Quail Ridge's principal place of business is 3570 Keith Street NW, Cleveland Tennessee. Amended Complaint, p. 2, ¶2, Answer to Amended Complaint, p. 1, ¶1.

(3) Quail Ridge operates an assisted living center located in Pocatello, Idaho. The assisted living center is located on a 4.25 acre piece of real property which is currently owned by PMC.

(4) The building from which the assisted living center is run and operated is owned by

(5) PMC and Quail Ridge are successors in interest to a certain Ground Lease Agreement (Lease Agreement) entered into on January 27, 1983.

(6) The Lease Agreement was originally entered into between IHC and Sterling whereby IHC leased 4.25 acres of real property, as Lessor, to Sterling, as Lessee.

(7) PMC is the successor in interest to IHC and Bannock County as it relates to the Lease Agreement and occupies the role as lessor. Quail Ridge is the successor in interest to Sterling and occupies the role of lessee.

(8) The Lease Agreement is for a thirty (30) year term of years commencing on February 1, 1983 and concluding on January 31, 2013. However, the Lease Agreement provides for one (1) ten (10) year option to extend the term of the lease. This option is to be exercised, if at all, by "giving Lessor written notice ... not later than 120 days prior to the expiration date of the Term."[9] (Lease Agreement, p. 2, §1.2)

(9) The Lease Agreement also provides that rent shall be paid on an annual basis as follows:

> An initial annual rental [sic] shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre.[10]

(Lease Agreement, pp. 2-3, §1.3(a)).

(10) The total acreage of leased land was 4.25 acres. Therefore, the annual rent for the first three (3) years of the Lease Agreement was $9,562.50.

---

[9]The option appears to be personal to Sterling. However, this does not appear to be an issue between the parties, despite the fact that there was no evidence at trial concerning the personal nature of the option and the option having been exercised, the parties seem to agree that the option has been exercised, that it is assignable to Quail Ridge, and that the Lease Agreement is and will be in place through January 31, 2023. This state of affairs seems to be further confirmed by the Landlord Consent and Estoppel Certificate entered in 2001 where the parties state that the Lease Agreement has been extended through and including January 31, 2023. Therefore, these issues will not be addressed or considered by the Court.

[10]The Commencement Date of the Lease Agreement is defined as the 1st day of February, 1983, or on or before thirty (30) days after a building permit is issued whichever is later. *See* Lease Agreement, p.2, §1.2. No evidence has been introduced regarding

(15) No evidence was introduced that the parties ever submitted this matter to arbitration as mandated in the Lease Agreement. Further, the parties freely admit that there has not been any attempt to arbitrate.[11]

(16) The Lease Agreement next provides that in arriving at the adjusted rent every three (3) years, the parties should consider the following:

> The rent as adjusted shall be equal to fifteen percent (15%) percent [sic] of the fair market value of the leased land, exclusive of the improvements on the premise. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.

(Lease Agreement, p. 3, §1.3(b)).

(17) The evidence at trial established that the parties have never followed the provisions contained in the Lease Agreement to effectuate an adjustment in the rent.

(18) Finally, the Lease Agreement provides that "if the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined." (Lease Agreement, p. 3, §1.3(b)).

(19) Richard Faulkner, Quail Ridge's designated representative at trial, testified that Quail Ridge has paid rent, annually, in the original and unadjusted amount of $9,562.50 and is current on its annual obligation.

---

[11]When the Court inquired of the parties concerning this matter they both advised the Court that they were waiving this requirement of the Lease Agreement. The Court relied upon what the Court determined to be a mandatory arbitration provision when it granted PMC's motion requesting that Quail Ridge be denied its jury demand.

(24) Finally, the 1996 Estoppel Certificate provides that the "Landlords consent to the Sublease as set forth herein shall not constitute or be construed as (a) a waiver or modification by Landlord of Tenant's duties or obligations under the Lease [Agreement], or (b) excuse Tenant's performance of any term or condition of the Lease [Agreement]." (1996 Estoppel Certificate, ¶10).

(25) No evidence was introduced that IHC attempted to proceed with the three (3) year annual rent adjustment in 1998 as referenced by the 1996 Estoppel Certificate.[14]

(26) Between 1996 and 2001 the relationship between the parties and Lease Agreement remained static. IHC was the Lessor, Sterling was the Lessee, and PMI was the Sub-tenant or Sub-Lessee. In 2001, the relationships changed.

(27) Sometime between 1996 and 2001, Sterling determined that it wanted to sell the building located on the leasehold and Sterling's principals wanted to be released from their personal guarantees associated with the financing of the building located on the leasehold. Likewise, PMI wanted to purchase this building.

(28) Richard Faulkner testified that for a number of reasons, not particularly germane to this litigation, in order to facilitate the transaction between Sterling and PMI wherein PMI would purchase the building located on the leasehold, a new entity was created. This entity was Quail Ridge Medical Investors (Quail Ridge). Quail Ridge then purchased the building located on the leasehold from Sterling and PMI continued on as a subtenant of Quail Ridge.

(29) Richard Faulkner testified that the transaction was complex and involved a number of parties (IHC, Sterling, Quail Ridge, PMI, and the Public Employee Retirement System of

[14]The only evidence introduced at trial regarding a demand by IHC or any of its successors in interest was in October of 2009 when PMC made a demand for a rent adjustment which led to the present controversy and litigation.

> Under the Lease [Agreement], the Tenant is obligated to pay rent at the rate of NINE THOUSAND FIVE HUNDRED AND SIXTY TWO DOLLARS AND FIFTY CENTS ($9,562.50) per annum. Rent has been paid through and including FEBRUARY 28, 2001.

(2001 Estoppel Certificate, ¶5). This provision contains two (2) dramatic alterations from the 1996 Estoppel Certificate. First the 1996 Estoppel Certificate states that Sterling (the Tenant) "is obligated to pay rent **currently** at the rate of ... $9,562.50 per annum." The term "currently" has been deleted from the 2001 Estoppel Certificate and reads Sterling (the Tenant) "is obligated to pay rent at the rate of ... $9,562.50 per annum." Further, while the 1996 Estoppel Certificate provides that "under Section 1.3(b) of the Lease [Agreement], the rent shall be adjusted on the next rent adjustment date"; this language is glaringly absent from the 2001 Estoppel Certificate.

(35) Richard Faulkner discusses, from his perspective and that of Quail Ridge, why the language of 2001 Estoppel Certificate differs from the 1996 Estoppel Certificate. At trial, the following dialogue occurred:

> Q. If you'll look at exhibit 228 [2001 Estoppel Certificate] again, going back to paragraph five, it says that "under the lease tenant is obligated to pay rent at the current rate of $9,562.50 per annum. The rent has been paid through and including February 28th, 2001."
>
> Now, the language talking about rent adjustment that appears in the '96 estoppel certificate is not in this certificate here?
>
> A. That's correct. I did not include it in the first draft.
>
> Q. And why was that left out?
>
> A. Because I had looked at what the parties had been doing since 1996, and for the five years that our group had been involved in the facility the rent adjustment mechanism had never been raised. And then I spoke with the folks from Sterling Development Group and understood that in the entire 13 years preceding our involvement no one had ever raised the section of the rent adjustment in order to increase or change the rent. So I wanted to confirm in the course of dealing that that had been waived.

Faulkner Trial Testimony, p. 165, LL.22-25, p. 166, LL.1-17.

(40) In 2009, shortly after PMC acquired and became successor in interest to the Lease Agreement, as part of its larger purchase of the hospital operated and known as Portneuf Medical Center, Don Wadle was asked to review the Lease Agreement. He was informed that a previous adjustment had not taken place and asked to determine the appropriateness of making an adjustment to the annual rent.

(41) Don Wadle determined that an adjustment to the annual rent would be appropriate and that there was a process in the Lease Agreement to obtain an adjustment.

(42) In 2009, PMC began the process of having the 4.25 acre leasehold appraised and following the appraisal PMC made Quail Ridge aware of its intent to increase the annual rent in accordance with the Lease Agreement.

(43) At trial Brad Janoush, a principal with Integra Realty Resources in Boise, Idaho testified regarding the market value of the 4.25 acres of property which is the subject of the Lease Agreement.

(44) Mr. Janoush was admitted to testify at trial as an expert real estate appraiser and consultant.

(45) Mr. Janoush opined, after discussing his methodology, that the 4.25 acres of property that are the subject of the leasehold had a value of $1,080,000 on January 27, 2007. He further testified that on January 27, 2010, the value of this 4.25 acre leasehold had declined in value from the January 27, 2007 date to $990,000.[17]

(46) Christian Joseph Anton (Anton) testified, by way of deposition introduced at trial, that he "assumed" that the $15,000 per acre figure utilized by the parties as the "fair market

[17]PMC has argued that the applicable modification date is January 23. The Court is not sure where this date comes from. The copy of the Lease Agreement admitted into evidence at trial reflects a signature date of January 27, 1983. However, the Lease Agreement itself provides that the applicable date for the rent adjustment is February 1. *See* Court's Findings of Fact Number 9 and footnote 10.

affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

(2) Idaho Code §10-1202 provides as follows:

Any person interested under a deed, will, **written contract** or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

[Bold Emphasis Added by the Court]

(3) Finally, Idaho Code §10-1203 provides as follows:

A contract may be construed either before or after there has been a breach thereof.

(4) Pursuant to the foregoing, the Court has authority and jurisdiction to declare the rights of PMC and Quail Ridge as the successors in interest to the Lease Agreement.

(5) In 1983, IHC and Sterling entered into a legally binding and valid Lease Agreement whereby Sterling leased 4.25 acres of property from IHC.

(6) PMC and Quail Ridge are the successors in interest to this Lease Agreement. PMC is the Lessor and Quail Ridge is the Lessee.

(7) In *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005), the Idaho Supreme Court discussed contract interpretation, in doing so it stated as follows:

When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning. The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties, this Court must view the contract as a whole. If a contract is found ambiguous, its interpretation is a question of fact. Whether a contract is ambiguous is a question of law. A contract is ambiguous if it is reasonably subject to conflicting interpretations.

(8) This Court, upon review of the Lease Agreement concludes that section 1.3(b) of the

footnote 10 to the Court's Findings of Fact. Therefore, the Lease Agreement called for adjustments to the annual rent on the following dates:

February 1, 1986
February 1, 1989
February 1, 1992
February 1, 1995
February 1, 1998
February 1, 2001
February 1, 2004
February 1, 2007
February 1, 2010

It also calls for adjustments to the annual rent on the following prospective dates:

February 1, 2013
February 1, 2016
February 1, 2019
February 1, 2022

(13) No adjustment to the annual rent under the Lease Agreement was effectuated pursuant to the terms of the Lease Agreement between 1986 and 2010. Further, no party to the Lease Agreement even attempted to adjust the annual rent until September and October of 2009 when PMC attempted to invoke section 1.3(b) of the Lease Agreement to effectuate a modification in the annual rent amount.

(14) The Court concludes that the second paragraph of section 1.3(b) is clear and unambiguous. It provides the procedure whereby the rent adjustment process is implemented. It allows for the parties to negotiate and submit by way of "written agreement" their agreement concerning the "fair market value" of the 4.25 acre leasehold for the upcoming three (3) year adjustment period. This period in which the parties are to negotiate and arrive at an agreed upon "fair market value" of the 4.25 acre leasehold is to occur within ninety (90) days of rent adjustment date. If the parties are successful in this endeavor, their agreed upon value is "a conclusive determination ... of fair market value for the period to which the adjustment applies." If the parties

v. Rocky Mountain Rogues, Inc., 148 Idaho 503, 513, 224 P.3d 1092, 1102 (2009). "The determination of a parties' intent with respect to a contract provision 'is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.'" *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011).

(18) The Court concludes that "fair market value" is a term of art in the legal and real estate fields. *Black's Law Dictionary* defines fair market value as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." *Black's Law Dictionary*, Seventh Edition. In *Logan v. Grand Junction Associates*, 111 Idaho 670, 671, 726 P.2d 782 783 (Ct.App.1986), the Idaho Court of Appeals considered a case where the trial court applied a nearly identical definition of fair market value (the legal definition of fair market value is what a willing buyer would pay a willing seller). Although the Idaho Court of Appeals did not rule on the correctness of this definition, neither did it indicate that this was not the correct definition. Rather, it reversed the trial judge on the basis that the methodology it applied in arriving at fair market value was in error. Brad Janoush, PMC's real estate appraiser expert, testified that fair market value is an antiquated term that was created and used back in the 1980's. He testified that the term now used is "market value." He defined market value as "the property's most probable sales price." He further testified that although the term "fair market value" "is hardly ever used currently, [it] ... may be thought of as being synonymous with market value."

(19) The Court concludes that these two (2) definitions of market value and fair market value are consistent and appear to be manageable definitions for the rent adjustment provision of the Lease Agreement if standing alone. However, they are not left standing alone.

County, and forgotten in its entirety except at times when ownership changed hands. It appears that there was no course of dealing between IHC and Sterling as well as their successors dealing directly with the three (3) year adjustment provision. Christison's testimony seems to intimate that IHC never sought a rent adjustment because it determined that the value of the leasehold acreage had not increased in value. Therefore, an adjustment process would have resulted in no change in the annual rent or a decrease. However, good management practices and compliance with the Lease Agreement would have required that they advise Sterling that they did not believe the value of the leasehold justified an increase in rent rather than just ignoring or forgetting about the rent adjustment provision.

(23) As stated in *Beus v. Beus*, *supra*, under Idaho law the parties' intent is to be determined by the express language of the document and reviewing the document as a whole. This is an issue of law. If there are ambiguities, then it becomes a question of fact concerning the intent of the parties. In ascertaining that intent, the fact finder may consider extrinsic evidence touching upon the parties' intent. In this case, the Court is the finder of fact. In discerning the intent of the parties, by way of extrinsic or parol evidence, the Court can consider the circumstances under which the Lease Agreement was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings. *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011) (*Beus*).

(24) As stated and discussed above, there is almost no credible or relevant evidence on these issues. The Court, in researching this issue, can find no controlling case law in Idaho that discusses how the Court should proceed when the record is entirely lacking extrinsic evidence of prior course of dealings and/or the parties' original intent.

is that there were no course of dealing for the following reasons: (1) Sterling, and later Quail Ridge, had no incentive to seek a rent adjustment (in a manner of speaking if Sterling or Quail Ridge "rocked the boat" they had nothing to gain and only increased rent to lose if they initiated a rent adjustment under the Lease Agreement); (2) IHC and Bannock County, through poor management and/or having forgotten about the rent adjustment provisions, never sought a rent adjustment.[20]

(28) Therefore: (1) because there is no evidence to establish how the original fifteen thousand dollar per acre figure was reached; and (2) because there is no evidence to establish a course of dealing to establish what construction the parties intended to give to the language related to subsequent adjustments, the Court will disregard these provisions of the Lease Agreement.[21]

(29) The Court will apply the current market value to the 4.25 acres of property which make up the leasehold. The Court accepts Janoush's opinion with respect to the current market value of the 4.25 acres, exclusive of improvements, as of February 1, 2007 as being $1,080,000. The Court further accepts Janoush's opinion with respect to the current market value of the 4.25 acres, exclusive of improvements, as of February 1, 2010 as being $990,000.

(30) In 2009, when PMC attempted to invoke section 1.3(b) of the Lease Agreement for purposes of modifying the annual rent, PMC had become the successor in interest to the original

[20]Again the Court recognizes that Christison testified that he reviewed all of IHC's executor contracts and that during his tenure no increase in rent was sought because he believed that the value in the property was not there to support a rent increase. While this may be an accurate state of affairs during Christison's tenure at IHC, 1989 through 2000; as Janoush's testimony established, in recent years, this area, east of I-15, has become a hot-bed of commercial development in Pocatello, Idaho. For these reasons, the Court concludes that there is no course of dealing with respect to IHC and Bannock County in their capacity as lessors due solely to mismanagement and the fact that the provisions of the Lease Agreement were forgotten on two (2) occasions in 1983 after the Lease Agreement was created and in 1996 after IHC agreed to PMI becoming a subtenant.

[21]Certainly these factors may play a role in future rent adjustments under the Lease Agreement, but there is no evidence in the record to allow them to play a role in the adjustment process this Court is being asked to consider as part of the declaratory judgment proceeding. For example, if the parties were, by written agreement, able to agree to rent adjustment that was based on a value less than 15% of market value as that term was defined by Janoush or *Black's Law Dictionary*, that would certainly be a relevant course of dealing evidence going forward.

> (1961). As with all modifications, the terms of a contract cannot be altered by one party without the other party's approval. *Id.* at 296, 362 P.2d at 386. Additionally, the minds of the parties must meet as to the proposed modification. *Id.* "The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of a change proposed by the other." *Id.* Whether an alleged modification is proven "is one for the trier of the facts to decide." *Res. Eng'g, Inc. v. Siler*, 94 Idaho 935, 938, 500 P.2d 836, 839 (1972).

This Court, as the finder of fact, determines that the evidence at trial does not support a finding by this Court of a modification to the terms of the Lease Agreement. Both the 1996 Estoppel Certificate and the 2001 Estoppel Certificate recite as follows:

> The Lease [Agreement] is in full force and effect, is valid and enforceable in accordance with its terms and has not been terminated. The Lease constitutes the only agreement of any kind or nature between the Landlord and the Tenant relating in any way to the Demised Premises.

1996 Lease Agreement, ¶2 and 2001 Lease Agreement, ¶2. Both the 1996 Estoppel Certificate and the 2001 Estoppel Certificate also provided as follows:

> Landlord's consent to the Sublease as set forth herein shall not constitute or be construed as (a) a waiver or modification by Landlord of Tenants duties or obligations under the Lease [Agreement], or excuse Tenants performance of any term or condition of the Lease [Agreement], or (b) a waiver or modification by Landlord to any rights, under the Lease [Agreement], including without limitation, Landlords right pursuant to Section 12.1 of the Lease Agreement.

1996 Estoppel Certificate, ¶10, and 2001 Estoppel Certificate, ¶10.

(35) The only evidence in the record regarding the modification of the Lease Agreement is the subjective intent of Faulkner. Faulkner testified as the individual drafting the 2001 Estoppel Certificate that he purposefully left out certain language that existed in the 1996 Estoppel Certificate because he "wanted to confirm in the course of dealing that that had been waived." The Court would suggest that removing language that was present in an earlier document and not discussing the same or making the other party aware of its deletion does not establish "mutual assent." In fact, some might question the propriety of such conduct. The Court finds that this unilateral act of

(38) The Idaho Supreme Court recently addressed the doctrine of waiver in *Knipe Land Co. v. Robertsen*, 151 Idaho 449, 457-58, 259 P.3d 595, 603-04 (2011). In doing so, it stated as follows:

> "A waiver is a voluntary, intentional relinquishment of a known right or advantage, and the party asserting the waiver must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment." *Fullerton v. Griswold*, 142 Idaho 820, 824, 136 P.3d 291, 295 (2006) (internal quotation omitted). "Waiver is foremost a question of intent." *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct.App.1987). A clear intention to waive must be shown before waiver shall be established. *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993). "Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." *Id.*

(39) As the Court previously ruled with respect to Quail Ridge's claim of contract modification, the Court, as the finder of fact, finds no facts to support the claim that IHC or Bannock County voluntarily and intentionally waived a known right. Rather, what the Court has found is that IHC and Bannock County, through poor management and oversight, neglected and/or forgot about the rent adjustment provision of the Lease Agreement. Such conduct does not establish the requisite intent to voluntarily waive the rent adjustment provision of the Lease Agreement.

(40) Finally, Quail Ridge asserts that the Court should apply the equitable doctrine of laches to the rent adjustment provisions and not allow PMC to modify the rent either retroactively or prospectively. The Court will accept Quail Ridge's laches defense in part and finds it to be inapplicable in part.

(41) In *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002), the Idaho Supreme Court discussed the defense of laches. In addressing this affirmative defense, the Supreme Court noted that the party asserting the defense bears the burden of proving

Agreement until October of 2009. This was two (2) years and over seven (7) months into the current rent adjustment period. This was not reasonable, nor was it compliant with the express provisions of the Lease Agreement, nor was it reasonable to expect Quail Ridge to have its annual rent adjusted two (2) years and seven (7) plus months into the current period.

(44) However, the Court does not find the same impediments to a prospective rent adjustment. In October of 2009, PMC notified Quail Ridge that it was seeking to adjust the rent in accordance with section 1.3(b) of the Lease Agreement. The Court concludes that this was consistent with the intent of obtaining a written agreement within the ninety (90) window set by section 1.3(b) of the Lease Agreement. These attempts were unsuccessful, and in June of 2010 litigation was initiated. The Court does not believe the doctrine of laches applies to PMC's attempts to effectuate a rent adjustment for the 2010 rent adjustment period as well as future rent adjustment periods. The Court concludes that although both parties failed to comply with the mandatory arbitration provision of the Lease Agreement, that PMC has complied with the provisions of the Lease Agreement sufficient to justify an adjustment to the annual rent.

(45) Therefore, the Court concludes that PMC is entitled to an adjustment in the rent for the years 2010, 2011, and 2012 in the amount of $148,500.00 annually. Therefore, for the three (3) year period applicable to the 2010 rent adjustment, the combined annual rent for these three (3) years is $445,500.00 by January 31, 2013, assuming that Quail Ridge remains current on its annual rent, it will have paid $28,687.50 towards the annual rent for this three (3) year period. As such it is entitled to a credit in this amount against the $445,500.00. This credit results in Quail Ridge being obligated to PMC in the total amount of $416,812.50 for rent for the period of February 1, 2010 through January 31, 2013.

CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that on the ~~16th~~ 17th day of October, 2012, she caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Memorandum Decision and Order to be served upon the following persons in the following manner:

PLAINTIFF ATTORNEY:
Kent L. Hawkins
P.O. Box 991
Pocatello, Idaho 83204-0991

- [X] Faxed
- [ ] Hand Delivered
- [■] Mailed

DEFENDANT ATTORNEY:
Michael D. Gaffney
2105 Coronado State
Idaho Falls, Idaho 83404

- [X] Faxed
- [ ] Hand Delivered
- [■] Mailed

DALE ~~HATCH, Clerk~~

Brandy Peck, Deputy Clerk

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2012 NOV 26 PM 5:06
BY _____ DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

******

POCATELLO HOSPITAL, LLC, dba PORTNEUF MEDICAL CENTERS, LLC,	)	
Plaintiff,	)	Case No. CV-2010-0002124-OC
vs.	)	**AMENDED DECLARATORY JUDGMENT**
QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES,	)	
Defendants.	)	

STATE OF IDAHO }
County of Bannock } ss.
I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office.
WITNESS my hand and official seal hereto affixed this 30 day of Nov 2012
DALE HATCH, CLERK OF THE DISTRICT COURT,
EX OFFICIO AUDITOR AND RECORDER.
BY _____ DEPUTY

Following a two (2) day bench trial conducted before the Court commencing on May 14, 2012 and concluding on May 15, 2012 and the Court having rendered its Findings of Fact, Conclusions of Law, and Memorandum Decision and Order the Court hereby enters this **DECLARATORY JUDGMENT** pursuant to Idaho Code §§ 10-1201 through 10-1203. This Declaratory Judgment declares the parties' respective rights and obligations with respect those issues. This Declaratory Judgment deals specifically with the rent adjustment provisions of the parties' Ground Lease Agreement (Section 1.3(b) and generally with sections 1.1, 1.2 and 1.3(a) of the parties' Ground Lease Agreement.

The Court hereby **ORDERS ADJUDGES AND DECREES** as follows:

(1) Pocatello Hospital, LLC dba Portneuf Medical Centers (PMC) is entitled to an adjustment in the annual rent owed by Quail Ridge Medical Investors, LLC (Quail Ridge) under the parties Ground Lease Agreement from $9,562.50 annually to $148,500.00 annually.

EXHIBIT
2
141 of 447

(2) This rent adjustment is for the three (3) period commencing on February 1, 2010 and concluding on January 31, 2013. Therefore the total rent due PMC from Quail Ridge is the amount of $445,500.00 for this three (3) year period.

(3) Quail Ridge has already paid PMC $9,562.00 annual rent on or about February 1 each year during that three year period for a total amount paid of $28,687.50.

(4) Therefore, based upon the rent adjustment, Quail Ridge is obligated to promptly pay PMC $416,812.50 under the terms of the parties' Ground Lease Agreement.

(5) The rent adjustment provision of the Ground Lease Agreement, dated January 27, 1983, of which PMC is the successor Lessor and Quail Ridge is the successor Lessee remains in full force and effect. The next rent adjustment, which is scheduled to take effect February 1, 2013, shall proceed consistent with section 1.3(b) of the Ground Lease Agreement.

IT IS SO ORDERED.

Dated this 26th day of November, 2012.

Mitchell W. Brown

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that on the 12th day of November, 2012, she caused a true and correct copy of the foregoing Order on Form of Judgment to be served upon the following persons in the following manner:

PLAINTIFF ATTORNEY:
Kent L. Hawkins
P.O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2499

☒ Faxed

DEFENDANT ATTORNEY:
Michael D. Gaffney
2105 Coronado State
Idaho Falls, Idaho 83404
(208) 529-9732

☒ Faxed

DALE ~~HATCH~~, Clerk

By: Deputy Clerk

GUARANTEE OF PAYMENT AND PERFORMANCE

By the execution hereof, and as a condition precedent to, and as inducement for, the execution and delivery by IHC Health Services, Inc., a Utah nonprofit corporation ("IHCHS"), of that certain Landlord Consent and Estoppel, dated as of June 1, 2001, and the foregoing Amendment, FORREST L. PRESTON, individually, unconditionally guarantees the payment and performance of any and all obligations of Quail Ridge Medical Investors, LLC, a Tennessee limited liability company ("Quail Ridge") and/or Pocatello Medical Investors Limited Partnership, a Tennessee limited partnership ("PMI"), under the "Ground Lease" and the "Sublease" (each as defined in the foregoing Amendment). To the fullest extent possible, the undersigned expressly waives notice of the acceptance of this Guarantee, notice of demand for payment, notice of nonpayment, notice of other default, notice of suit, and all other notices to which the undersigned might otherwise be entitled in connection with this Guarantee. Further, the undersigned waives any responsibility or duty IHCHS may have to the undersigned to proceed against Quail Ridge and/or PMI or to pursue any other legal remedy available. Upon any default, IHCHS may, at its option, proceed directly, and at once, without notice, against the undersigned without proceeding against Quail Ridge and/or PMI or any other person. In addition, the undersigned further agrees, without demand, immediately to reimburse and pay for all costs and expenses, including reasonable attorneys' fees, incurred in the enforcement of this Guarantee.

DATED as of the 1st day of June, 2001.

FORREST L. PRESTON

EXHIBIT
3

COPY

GROUND LEASE AGREEMENT

Table of Contents

EXHIBIT 4

Table of Contents - Page Two

GROUND LEASE AGREEMENT

This Ground Lease Agreement is made and entered into this 27 day of January, 1983, by and between INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation, authorized to do business in the State of Idaho under the name of Pocatello Regional Medical Center (hereinafter called "Lessor"), and STERLING DEVELOPMENT CO., a Washington partnership authorized to do business in the State of Idaho, (hereinafter called "Lessee").

R E C I T A L S

WHEREAS, Lessor owns certain real property located within the City of Pocatello, Bannock County, Idaho; and

WHEREAS, Lessor wishes to lease to Lessee approximately 4 acres, more or less, of said property for construction of a Psychiatric Hospital building (the "hospital") and to impose certain restrictions on the use of such parcel of real property and Lessee wishes to lease said parcel of real property for such purpose, subject to Lessor's restrictions; and

WHEREAS, Lessor and Lessee wish to enter into a written ground lease agreement setting forth the terms, conditions and restrictions under which said parcel of real property is to be leased;

NOW, THEREFORE, for and in consideration of the mutual covenants, conditions and promises contained herein, Lessor and Lessee agree as follows:

ARTICLE 1
DESCRIPTION, TERM AND RENTAL

1.1 Real Property Leased. Lessor hereby leases to Lessee and Lessee hereby leases from Lessor the real property described

HORENSTEIN, WYNNE, FERGUSON & STOLTZ
ATTORNEYS AT LAW
1320 MAIN ST. • SUITE 300
P.O. BOX 694
VANCOUVER, WASHINGTON

in Exhibit "A" attached hereto and hereby made a part hereof, including all easements, right-of-way interests associated therewith whether granted or by prescription, and any and all other interests or rights appurtenant to the property and in adjoining and adjacent land, highways, roads, streets and lanes, whether public or private, which are reasonably required for installation, maintenance, operation and service of electricity, gas, sewer, telephone, water and other utility lines and for driveways and approaches to and from abutting ways for the use and benefit of the above described real property, including improvements to be erected thereon (hereinafter called the "leased land"), situated in the County of Bannock, State of Idaho.

1.2 Term. The term of this Lease shall be for a period of thirty (30) years (hereinafter referred to as the "Term"), commencing on the 1st day of February, 1983, or on or before thirty (30) days after a building permit is issued, whichever is later, (the "Commencement Date"), with one (1) ten (10) year option to extend such term to be exercised as provided in Article 14, Paragraph 14.1, hereof. Such option to extend the term is personal to Lessee and may not be assigned or conveyed in any manner whatsoever to another party. Lessee shall be entitled to possession of the leased land on the Commencement Date.

1.3 Rent and Payment Thereof.

(a) Rental. Lessee shall pay the following annual rental amount:

An initial annual rental shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen

HORENSTEIN WYNNE, FERGUSON & STOUMEN
ATTORNEYS AT LAW
[illegible] MAIN ST. • SUITE 300
P.O. BOX [illegible]
VANCOUVER, WASHINGTON [illegible]

Thousand and No/100 Dollars ($15,000.00) per acre.

(b) Adjustments Based on Property Value. The annual net rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date.

The parties' written agreement within ninety (90) days before the applicable rent adjustment date shall be a conclusive determination between the parties of the fair market value for the period to which the adjustment applies. If the parties have not so agreed by the applicable rent adjustment date, the determination shall be made as in the paragraph on Arbitration in Article 13.

The rent as adjusted shall be equal to fifteen percent (15%) percent of the fair market value of the leased land, exclusive of the improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.

If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.

HORENSTEIN WYNNE, FERGUSON & STOLTZ
ATTORNEYS AT LAW
[illegible]
151 of 447

(c) Definition of Lease Year. A lease year is either a calendar year or a fiscal year, as selected by Lessee.

1.4 Negation of Partnership. Nothing in this Lease shall be construed to render the Lessor in any way or for any purpose a partner, joint venturer, or associate in any relationship with Lessee other than that of landlord and tenant, nor shall this Lease be construed to authorize either to act as agent for the other, except as expressly provided to the contrary in this Lease.

1.5 Place of Rental Payments. All payments of Rental required to be paid to Lessor under the terms of this lease shall be made in lawful money of the United States which at time of such payment shall be legal tender for the payment of public and private debts, free from all claims, demands, deductions, abatements, set-offs, prior notices or counterclaims of any kind or character against Lessor and shall be payable at the following address or at such other place or places as may be from time to time designated by Lessor by written notice given to Lessee:

Pocatello Regional Medical Center
777 Hospital Way
Pocatello, Idaho 83201

1.6 Fee Mortgages. Lessor may grant mortgages, Deeds of Trust or other security interests in the leased land by subordination agreement, provided, however, that such mortgages, Deeds of Trust or security interests shall be subject to this lease and further provided that Lessee deliver a copy of any such proposed mortgage, Deed of Trust or other security interest and related note to Lessor for prior examination and approval; provided, however, that such examination and approval shall be accomplished by Lessor in a diligent manner.

HORENSTEIN, WYNNE, FERGUSON & STOLNIS
ATTORNEYS AT LAW
123 MAIN ST • SUITE 300
P.O. BOX 604
WALLA WALLA, WASHINGTON 99362
(509) 525-1711

ARTICLE 2

USE OF LEASED LAND AND TITLE TO IMPROVEMENTS

2.1 Use of Leased Land. Lessee shall use the leased land solely for the purpose of constructing, maintaining and operating the hospital for psychiatric care and substance abuse treatment; provided that Lessee may at any time use the leased land for any lawful purpose. Lessee shall commence construction of the hospital within forty-five (45) days after the commencement date of this Lease and the issuance of a building permit. If Lessee is delayed in commencing construction or receiving the permit by any cause or causes beyond Lessee's control, such causes including but not necessarily being limited to Acts of God, strikes, war, insurrections, and the like, said forty-five (45) day period to commence construction shall be extended for a period equivalent to the time lost by reason of any such cause or causes; provided, however, that no extensions shall be granted for any such delay which commences more than ten (10) days before Lessee notifies Lessor of such delay and the reasons therefor. Once construction is begun, Lessee shall, with reasonable diligence, prosecute to completion all construction of improvements, additions, or alterations and shall have substantially completed construction of the hospital within One (1) years after date of this lease. "Substantial completion" shall mean that the hospital is ready for occupancy and use as a hospital as evidenced by a Certificate of Occupancy or other like document issued by an appropriate governmental authority. If Lessee is delayed in substantial completion of the hospital by any cause or causes beyond Lessee's control, such causes including but not necessarily being limited to Acts of God, strikes, war, insurrections, and the like, said date for substantial completion of the hospital shall be extended for a period equivalent to the time lost by reason of any such cause or causes; provided, however, that no extensions will be granted for any such delay

[illegible]

which commences more than ten (10) days before Lessee notifies Lessor of such delay and the reasons therefor. All work shall be performed in a good and workmanlike manner, shall substantially comply with plans and specifications submitted to Lessor as required by this lease, and shall comply with all governmental permits, laws, ordinances and regulations. Lessee shall not bring, cause to be brought, or permit to be brought or kept on the leased land anything which will in any way conflict with any law, ordinance, rule, or regulation, or commit or suffer to be committed any waste upon the leased land, or use or allow the leased land or hospital to be used for any immoral or unlawful purpose.

2.2 Architectural Compatibility. It is understood and agreed that the hospital will be architecturally compatible with the Med Center hospital. In order to insure that this be accomplished, Lessee shall submit its site plan, elevations, and architectural plans and specifications for the hospital to the Board of Directors of the Med Center hospital for approval before commencing construction. The approval of the Board of Directors shall not be unreasonably withheld and response shall be given within forty-five (45) days following the submission of Lessee's plans and specifications.

2.3 Required Parking. Lessee agrees that in designing the site plans and the plans and specifications for construction of the hospital, it will include sufficient off-street parking spaces to accommodate the minimum required by local codes.

2.4 Title to Buildings. Title to the hospital and appurtenances thereto and all other improvements and fixtures located on the leased land or constructed or placed on the leased land by Lessee or its tenants shall be and remain in Lessee during the Term. Lessee shall have the right to make alterations, changes and repairs as provided herein. No interest in any buildings, permanent improvements, or fixtures shall pass

HORENSTEIN, WYNNE, FERGUSON & STOLNITZ
ATTORNEYS AT LAW
[illegible]

to Lessor until the expiration of the Term or the prior termination of this lease by default of Lessee giving Lessor the right to terminate this lease pursuant to Article 10 hereof. Lessee covenants and agrees that upon expiration of the Term it will yield up and deliver the leased land with any such buildings, permanent improvements, and fixtures upon the leased land at such time free and clear of all liens and encumbrances of any kind, and upon such expiration title therein shall be in Lessor. In the event of earlier termination of this lease, Lessee covenants and agrees that it will yield up and deliver the leased land with any such buildings, permanent improvements, and fixtures upon the leased land at such time free and clear of all liens and indebtedness of any kind. Provided, however, that such obligation to deliver the leased land and improvements free and clear of all liens and indebtedness shall not apply to the original lien of first encumbrance represented by the mortgage or Deed of Trust or other security interest referred to in Article 6 hereof given to secure the financing for the construction of the original buildings, permanent improvements, and fixtures upon the leased land. Upon such earlier termination, title in the buildings, permanent improvements and fixtures upon the leased land shall be in Lessor.

2.5 Deed at Termination. Upon termination of this lease, Lessee shall, subject to the foregoing, execute a deed satisfactory in form and content to Lessor confirming Lessor's title to any buildings, permanent improvements, and fixtures therein, upon the leased land at the time of termination.

2.6 Additional Real Property. At such time as Lessee shall require additional real property for the expansion of the hospital, Lessee shall so notify Lessor and Lessor shall in good faith consider the leasing of additional real property to Lessee for such purpose.

HORENSTEIN, WYNNE, FERGUSON & STOLSIEK
ATTORNEYS AT LAW
1201 THIRD AVE • SUITE 3000
P.O. BOX 91302
SEATTLE, WASHINGTON 98111

2.7 Grant of Cost of Utilities and Easements. Upon requests being made, Lessor shall grant to public entities or other public service corporations, for the purpose of serving only the property, rights of way or easements on or over the property for poles or conduits or both, for telephone, electricity, water, sanitary or storm sewers or both, and for other utilities and municipal or special district services.

The cost of utilities, their installation and maintenance, are to be assumed, fully paid and satisfied by Lessee.

ARTICLE 3

CONSTRUCTION, ALTERATIONS AND MAINTENANCE

3.1 General Maintenance. Throughout the Term, Lessee shall, at Lessee's sole cost and expense, maintain the premises and all improvements in good condition and repair, ordinary wear and tear excepted, and in accordance with all applicable laws, rules, ordinances, orders and regulations of (1) federal, state, county, municipal, and other governmental agencies and bodies having or claiming jurisdiction and all their respective departments, bureaus, and officials; (2) the insurance underwriting board or insurance companies insuring all or any part of the premises or improvements or both; and (3) Lessor, as shall be in effect from time to time. Lessee shall manage and operate the hospital and the surrounding grounds in a competent and professional manner. Lessee shall maintain the sidewalks and roadways giving access to the hospital free and clear of ice and snow.

Except as provided below, Lessee shall promptly and diligently repair, restore and replace as required to maintain or comply as above, or to remedy all damage to or destruction of all or any part of the improvements resulting wholly or in part from causes required by this lease to be covered by fire or extended coverage insurance, if the cost of the work so required does not

HORENSTEIN WYNNE, FERGUSON & STOUDER
ATTORNEYS AT LAW

exceed seventy-five percent (75%) of the replacement value of all of the improvements. If the cost does exceed that percent, Lessee may nevertheless repair, restore and replace as above or may by notice elect instead to raze the improvements damaged or destroyed. Within thirty (30) days after such notice, Lessor may by notice elect to repair, restore and replace as above, and Lessee shall not raze until the expiration of the time for Lessor's notice of election. Lessor shall not be required to furnish any services or facilities or to make any repairs or alterations of any kind in or on the premises. Lessor's election to perform any obligation of Lessee under this provision on Lessee's failure or refusal to do so shall not constitute a waiver of any right or remedy for Lessee's default, and Lessee shall promptly reimburse, defend, and indemnify Lessor against all liability, loss, cost, and expense arising from it.

In determining whether Lessee has acted promptly as required under the foregoing paragraph, one of the criteria to be considered is the availability of any applicable insurance proceeds.

Nothing in this provision defining the duty of maintenance shall be construed as limiting any right given elsewhere in this lease to alter, modify, demolish, remove, or replace any improvement, or as limiting provisions relating to condemnation or to damage or destruction during the final year or years of the Term. No deprivation, impairment, or limitation on use resulting from any event or work contemplated by this paragraph shall entitle Lessee to any offset, abatement, or reduction in rent nor to any termination or extension of the Term.

3.2 Relief for Substantial Loss of Area. If any damage to or destruction of the premises or the improvements is such that 75% of the floor area is rendered unusable for purposes stated in the Lease, Lessee may, at Lessee's election, delay the work

HORNSTEIN WYNN JEFFERSON & STOKESBERRY
ATTORNEYS AT LAW
[illegible] SUITE 300
P.O. BOX [illegible]
WENATCHEE, WASHINGTON [illegible]

required above for not to exceed six (6) months. Nothing contained in this paragraph shall be construed to negate or modify any provision of this lease relating to damage or destruction during the final year(s) of the term.

3.3 Major and Minor Distinguished. Lessor's approval is not required for Lessee's minor repairs, alterations, or additions. "Minor" means a construction cost not exceeding Five Thousand and No/100 Dollars ($5,000.00), none of which is derived from funds advanced on the security of an encumbrance on the leasehold or the property. "Construction cost" includes all costs that would constitute the basis of a valid claim or claims under the mechanics' lien laws in effect at the time the work is commenced for any demolition and any removal of existing improvements or parts of improvements as well as for preparation, construction and completion of all new improvements or parts of improvements. The dollar amount stated above shall be adjusted by the percentage change in the index known as the United States Department of Commerce Composite Construction Cost Index as published in the Survey of Current Business by the U.S. Department of Commerce, or successor index. If the index is discontinued and there is no successor index, the reference figure shall be determined by the senior officer in the closest office of the U.S. Department of Commerce or successor department or agency. "Major" repairs, alterations, or additions are those not defined as minor above. For major repairs, alterations, or additions, Lessee shall receive Lessor's approvals of the plans as set forth above in Paragraph 2.2.

3.4 Governmental Authorities. Lessee shall promptly comply with all applicable laws, regulations, ordinances, requirements and orders of governmental authorities, including, but not limited to, the making, at its sole expense, of any installation, alteration, modification, change or repair, structural or otherwise; provided, however, Lessee has the right to contest by

HORLAITEN, WINNE, HERCULSON & STOLTMAN
ATTORNEYS AT LAW
[illegible]

appropriate judicial or administrative proceedings, without cost or expense to Lessor, the validity or application of any law, ordinance, order, rule, regulations or requirement (hereinafter called "Law") that Lessee repair, maintain, alter or replace the improvements in whole or in part, and Lessee shall not be in default for failing to do such work until a reasonable time following final determination of Lessee's contest. If Lessor gives notice of request, Lessee shall first furnish Lessor a bond, satisfactory to Lessor in form, amount and insurer, guaranteeing compliance by Lessee with the contested law, and indemnifying Lessor against all liability that Lessor may sustain by reason of Lessee's failure or delay in complying with the Law. Lessor may, but is not required to, contest any such Law independently of Lessee. Lessor may, and on Lessee's notice of request shall, join in Lessee's contest.

3.5 Damage or Destruction During Final Years of Term. In the event of substantial damage or destruction to the hospital or any part thereof during the last five (5) years of the Term, Lessor shall have the right, exercisable during the ninety (90) days following the date of such damage or destruction, to terminate this lease. Lessor shall exercise such right by delivering to Lessee written notice of the date of such termination, which date shall not be earlier than thirty (30) days following the date of Lessor's notice of termination. Upon exercise of such right, Lessor shall be entitled to recover the full proceeds of any policy of insurance covering any such damage or destruction except such proceeds as may be attributable to Lessee's loss of personal property and/or to interruption of Lessee's business.

If Lessor does not elect to terminate this lease, Lessee shall be responsible for the repair, rebuilding or replacement of the hospital or any part thereof so damaged or destroyed as the case may be. All such repairs, rebuilding or

HORNSTEIN, WYKHE, FERGUSON & SLOCUM
ATTORNEYS AT LAW

replacements shall restore the hospital to the condition it was in immediately prior to the event giving rise to the work.

3.6 Last Year of Term. Anything herein to the contrary notwithstanding, Lessee shall not have the right during the last 365 days of the Term to alter, remove or demolish, in whole or in part, any buildings, structures or other improvements which exist upon the leased land 365 days prior to the end of the Term, except with the written consent of Lessor. This provision shall not impair the right of Lessee to remove any moveable items of personal property from the leased land as provided in Article 3 hereof.

ARTICLE 4
LEASEHOLD LIENS

4.1 Right to Grant Lien on Leasehold Estate. So long as Lessee shall not be in default under the terms of this lease, Lessee shall have the right to grant a lien upon or a security interest in its leasehold estate under this lease; provided, however, that notwithstanding any such instrument granting such lien or security interest, Lessor is bound only by those obligations and enjoys all rights and privileges which are set forth in this lease. Any mortgage or Deed of Trust or other security interest executed by Lessee pursuant to this authority is hereinafter designated and referred to as the "leasehold mortgage" and the holder or owner of such leasehold mortgage upon the leasehold estate of Lessee, including the beneficiary of a Deed of Trust, if such mortgage be in the form of a Deed of Trust or other secured party, is hereinafter designated as the "leasehold mortgagee". Any leasehold mortgage shall not be for a period exceeding the Term. Lessor agrees, at any time and from time to time, upon receipt of not less than ten (10) days prior written request therefor by Lessee or by the leasehold mortgagee, to execute, acknowledge and deliver to Lessee or to leasehold

MORTSOLF & WYNNE, FERGUSON & STOUMEN
ATTORNEYS AT LAW
1220 MAIN ST. • (360) 750-1151
P.O. BOX 1086
VANCOUVER, WASHINGTON 98666

mortgagee a statement in writing, certifying, if such is the case, that this lease is then unmodified and unamended, that it is not in default, and that it is in full force and effect. If there have been modifications and amendments to this lease, said statement shall, if such is the case, certify that the same is not then in default and is in full force and effect as then modified and amended. Said modifications and amendments shall be set forth in full in said statement. Said statement shall further state the dates to which the basic rental or other charges have been paid, and whether or not there is any existing default by Lessee with respect to any covenant, promise of agreement on the part of Lessee provided to be performed under this lease, and also whether a notice of such default has been served by Lessor. If any such statement contains a claim of non-performance, insofar as actually known by Lessor, shall be summarized in said statement. Lessee shall make payment when due and before delinquency of all principal, interest and other charges for which Lessee may be or become obligated under any leasehold mortgage upon the leasehold estate.

4.2 Foreclosure of Lien. Prior to commencing any action to foreclose a leasehold mortgage, the leasehold mortgagee, or any assigns of such mortgage, shall notify Lessor in writing of the default by Lessee with a statement of the amount then due and offer to withhold any acceleration of maturity of the promissory note, payment of which is secured by the leasehold mortgage. In the event Lessor shall, within thirty (30) days of the receipt of said notice, pay to said mortgagee all amounts then in arrears on said mortgage, then upon said payment said mortgagee shall reinstate the mortgage in all respects as if no default had occurred. Lessor may, at its option, make such payments on said mortgage, and the amounts of such payments shall be considered additional rental due Lessor from Lessee under this lease. Subsequent and successive defaults by Lessee in making payments required by any

HORENSTEIN, WYNNE, FERGUSON & STOCKMEYER
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]
VANCOUVER, WASHINGTON [illegible]

leasehold mortgage shall be subject to the foregoing provisions each time any such default occurs. Lessee shall insure that all provisions contained in this lease requiring action by parties not a party hereto shall be incorporated into documents to which such parties are a party and that executed copies of such documents be delivered to Lessor within ten (10) days of execution thereof.

ARTICLE 5
PROTECTION OF MORTGAGEE

Lessee shall give notice to Lessor of any leasehold mortage which Lessee grants as provided for in Article 4 hereof and shall deliver along with said notice a copy of the mortgage instrument. So long as any sum remains owing on any obligation secured by such a leasehold mortgage, Lessor and Lessee agree:

(a) That no modification or termination of this lease or surrender of the leased land may be made by the Lessor or Lessee without the prior written consent of the mortgagee;

(b) That the Lessor will give to the mortgagee all notice of default simultaneously with any notice given to the Lessee;

(c) That the mortgagee will have thirty (30) days after notice of default delivered to it within which to cure Lessee's default; provided, however, that said period in which default may be corrected may be extended to no more than ninety (90) days in the event the mortgagee requires such a period as a condition for granting a loan to Lessee and if within forty (40) days after notice of default the mortgagee gives notice to Lessor if it intends to cure Lessee's default within said extended period;

(d) That the Lessor will accept performance by the mortgagee in lieu of performance by the Lessee;

(e) That the Lessor will not terminate the lease for those defaults, the cure of which requires that the mortgagee be in possession provided that the said mortgagee (i) promptly

MORRISON WAYNE, FERGUSON & STO
ATTORNEYS AT LAW
1200 MAIN ST. • SUITE 300
P.O. BOX 446

commences foreclosure and continues its action with due diligence, and (ii) continues payment of rent and all other charges required to be paid by Lessee which have accrued and which become due and payable during the period the foreclosure proceeding is pending;

(f) That the Lessor shall not have the right to terminate this lease solely on account of any of the events anticipated by subdivision (d) of paragraph 1 of Article 10 without the written consent of the leasehold mortgagee, provided that such mortgagee promptly commences foreclosure if it has the right to do so and thereafter continues its action with due diligence;

(g) That in the event the Lessee's interest under this lease shall be sold, assigned or otherwise transferred pursuant to the exercise of any right, power or remedy of any mortgagee or pursuant to judicial proceedings or pursuant to paragraph 1 of Article 10, and if no rent or other charges shall then be due an payable under this lease, and if such mortgagee shall have arranged to the reasonable satisfaction of the Lessor for the curing of any default susceptible of being cured, Lessor within sixty (60) days after receiving a written request therefor and upon receiving payment of its expenses, including attorneys' fees, incident thereto, will execute and deliver such instrument or instruments as may be required to confirm such sale, assignment or other transfer of Lessee's interest under the lease; or

(h) That in the event a default under any leasehold mortgage shall have occured, the mortgagee may exercise any right, power or remedy of the mortgagee under the mortgage which is not in conflict with the provisions of the lease.

HORENSTEIN, WYNNE, FERGUSON & STOUNBE
ATTORNEYS AT LAW
1200 MAIN ST • SUITE 100
P.O. BOX 994
VANCOUVER, WASHINGTON 98660

ARTICLE 6

SUBORDINATION

6.1 Subordination. The Lessor shall, promptly after the notice of request of Lessee, execute and deliver a mortgage, Deed of Trust or other security instrument (herein called mortgage) sufficient to subordinate, to the lien of a first encumbrance represented by the mortgage, Lessor's fee title (which shall be considered to include fee title in the leased premises or any part or parts of the leased premises, including all rights and appurtenances) to any mortgage lender who is prepared to make a mortgage loan to Lessee to be secured by a first mortgage or Deed of Trust covering said Lessor's fee interest in the demised premises (or such part thereof as may be designated by Lessee) provided that said mortgage is on terms not more onerous than the following:

Principal: Not more than seventy-five percent (75%) of the value of the property to be mortgaged as appraised by any institutional lender proposing to make the loan, or as independently appraised if the lender be other than an institution. An institutional lender is a bank, insurance company, charitable institution, college or other institution of learning, retirement system, welfare fund, or any other organization or institution similar to any of the foregoing. The principal must be self-liquidating by periodic payments over the term of the mortgage;

Maturity: Not more than thirty (30) years or alternatively not more than the period of the unexpired term between the date of the mortgage and the end of the term,

HORENSTEIN, WYNNE FERGUSON & STOUMEN
ATTORNEYS AT LAW
[illegible]

whichever is the shorter. The "term" means the original term herein or exercise of the renewal options herein provided for.

6.2 Expenses. All expenses in connection with the making of said mortgage or Deed of Trust shall be borne by Lessee, and Lessor will execute any and all documents that may be required with respect thereto. However, Lessor shall assume no personal liability for the underlying indebtedness, but the mortgage note or other evidence of indebtedness shall be executed solely by the Lessee. The foregoing provisions of this Article shall extend to any construction mortgage loan applied for by Lessee, as well as any permanent mortgage loan, and any mortgages in substitution or in replacement thereof, and as often as during the term such loans are applied for by the Lessee.

6.3 Non-Mortgage by Lessor. Lessor agrees not to place any mortgage on the premises, or permit the same to be encumbered in any manner, without the prior written consent of the Lessee.

6.4 Limitation on Subordination. Lessor's agreement to subordinate any given portion of the fee title to a first mortgage is limited to one such mortgage on the given portion of the fee title for the purpose of enabling Lessee to obtain financing for the improvements as contemplated herein and located on the given portion of the leased land; provided that, for this purpose, mortgages securing separate construction and take-out or permanent loans for the same work of improvement shall be considered to be one mortgage. Both the note and the mortgage securing it shall expressly provide that there can be no extension of the due date, addition to the balance of the loan, alteration of any provision in the documents, release of any obligor, or any refinancing of the unpaid principal balance without Lessor's prior written approval. Nothing in this paragraph shall prohibit mortgagee from paying delinquent taxes or

HORENSTEIN, WYNNE, FERGUSON & STOUMB
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 300
P.O. BOX 644

assessments or providing insurance coverage if Lessor fails to cure such defaults of Lessee. Lessor shall not be required to subordinate Lessor's fee title to the lien of an encumbrance securing a construction or interim loan except on Lessee's presentation of evidence, delivered as provided for giving notices, of a firm-and-enforceable commitment for a take-out or permanent loan.

6.5 Curing of Defaults. The mortgage shall provide that the mortgagee or trustee may not accelerate the due date of the balance outstanding on any loan by reason of any default by Lessee without having first given Lessor written notice of such default and without having permitted Lessor thirty (30) days in which to cure such default or, if more than thirty (30) days is necessary to cure such default, without having given Lessor adequate time to cure such default. The mortgage and related documents shall further provide that the performance of any and all obligations of Lessee thereunder shall be accepted if tendered by Lessor. Neither Lessor's right to cure any default nor any exercise of such a right shall constitute an assumption of liability under the note or mortgage.

6.6 Indemnification. On request by Lessor, Lessee shall indemnify Lessor from any and all liability and expense caused Lessor as a result of any action of Lessee in connection with the mortgage or Deed of Trust.

ARTICLE 7
INSURANCE

7.1 Liability and Property Damage. From the time when the Lessee commences construction on the demised premises or any part thereof, the Lessee will cause to be written a policy or policies of insurance in the form and contents generally known as public liability and/or owner's, landlord and tenant policies and boiler insurance policies and elevator insurance policies, when there be

HORENSTEIN WAYNE FERGUSON & STORMER
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 300
P.O. BOX 1158
VANCOUVER, WASHINGTON 98660

boilers and elevators included in any improvements located on the demised premises, insuring the Lessee against any and all claims and demands made by any person or persons whomsoever for injuries received in connection with the operation and maintenance of the premises, improvements, and buildings located on the demised premises or for any other risk insured against by such policies, each class of which policies shall have been written within limits of not less than Five Hundred Thousand and No/100 Dollars ($500,000.00) for damages incurred or claimed by any one person for bodily injury, or otherwise, plus One Hundred Thousand and No/100 Dollars ($100,000.00) damages to property, and for not less than One Million and No/100 Dollars ($1,000,000.00) for damages incurred or claimed by more than one person for bodily injury, or otherwise, plus One Hundred Thousand and No/100 Dollars ($100,000.00) damages to property. All such policies shall name the Lessee and the Lessor, as their respective interests may appear, as the persons assured by such policies; and the original or duplicate original of each of such policy or policies shall be delivered by the Lessee to the Lessor promptly upon the writing of such policies, together with adequate evidence of the fact that the premiums are paid.

7.2 Fire and Wind Damage Insurance.

(1) Lessee's Obligation. The Lessee covenants and agrees with Lessor that from and after the time when the lease commences, the Lessee will keep insured any and all buildings and improvements upon the said premises against all loss or damage by fire and windstorm, and what is generally termed in the insurance trade as "extended coverage", which said insurance will be maintained in an amount which will be sufficient to prevent any party in interest from being or becoming a co-insurer on any part of the risk, which amount shall not be less than eighty percent (80%) of the full insurable value, and all of such policies

HORENSTEIN, HYANE FERGUSON & STOCKMAR
ATTORNEYS AT LAW
P.O. BOX
VANCOUVER, WASHINGTON

of insurance shall include the name of the Lessor as one of the parties insured thereby and shall fully protect both the Lessor and the Lessee as their respective interest may appear. In the event of destruction of the said buildings or improvements by fire, windstorm, or other casualty for which insurance shall be payable and as often as such insurance money shall have been paid to the Lessor and the Lessee, said sums so paid shall be deposited in a joint account of the Lessor and the Lessee in a bank located in Bannock County, Idaho, and shall be made available to the Lessee for the construction or repair, as the case may be, of any building or buildings damaged or destroyed by fire, windstorm, or other casualty for which insurance money shall be payable and shall be paid out by the Lessor and the Lessee from said joint account from time to time on the estimate of any reliable architect licensed in the State of Idaho having jurisdiction of such reconstruction and repair, certifying that the amount of such estimate is being applied to the payment of the reconstruction or repair and at a reasonable cost therefor; provided, however, that it first be made to appear to the satisfaction of the Lessor that the total amount of money necessary to provide for the reconstruction or repair of any building or buildings destroyed or injured, as aforesaid, according to the plans adopted therefor, has been provided by the Lessee for such purpose and its application for such purpose assured; and the Lessee covenants and agrees that in the event of the destruction or damage of the buildings and improvements or any part thereof, and as often as any building or improvement on said premises shall be destroyed or damaged by fire, windstorm, or other casualty, the Lessee shall rebuild and repair the same in such manner that the building or improvement so rebuilt and repaired, and the personal

HORENSTEIN WYMAN, FERGUSON & STOLARIC
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 500
P.O. BOX 984
WALLA WALLA, WASHINGTON 99362

property upon the demised premises prior to such damage or destruction, and shall have the same rebuilt and ready for occupancy within fifteen (15) months from the time when the loss or destruction occurred. The fifteen (15) month period for reconstruction shall be enlarged by delays caused without fault or neglect on the part of the Lessee by act of God, strikes, lockouts, or other conditions beyond the Lessee's control.

(2) Delivery of Policies. The originals of all such policies shall be delivered to the Lessor by the Lessee along with the receipted bills evidencing the fact that the premiums therefore are paid; but nothing herein contained shall be construed as prohibiting the Lessee from financing the premiums where the terms of the policies are for three (3) years or more and in such event the receipts shall evidence it to be the fact that the installment premium payment or payments are paid at or before their respective maturities. Where, however, there is a mortgage on the premises created pursuant to the provisions contained in this lease and if, under the terms of such mortgage, it is obligatory upon the Lessee to cause the originals of the policies to be delivered to the mortgagee, then the Lessee shall deliver to the Lessor duplicate certificates of such policies. The policies or duplicate certificates thereof, as the case may be, shall be delivered by the Lessee to the Lessor at least ten (10) days prior to the effective date of the policies.

(3) Effect of Mortgage Subordination. All of the provisions herein contained relative to the disposition of payments from insurance companies are subject to the fact that if any mortgagees holding a mortgage created pursuant to the provisions of this lease hereof elects, in accordance with the terms of such mortgage, to require that the proceeds of

HORNSTEIN, WYNNE, FERGUSON & STOLOMBE
ATTORNEYS AT LAW

the insurance be paid to the mortgagee on account of such mortgage, then such payment shall be made, but in such event, it shall still be obligatory upon the Lessee to create the complete fund in the manner set forth in this section to assure and complete the payment for the work of reconstruction and repair.

(4) Damages; Insurance Proceeds; Joint Bank Account. It is agreed that any excess of money received from insurance remaining in the joint bank account after the reconstruction or repair of such building or buildings, if there be no default on the part of the Lessee in the performance of the covenants herein, shall be paid to the Lessee, and in case of the Lessee not entering into the reconstruction or repair of the building or buildings within a period of six (6) months from the date of payment of the loss, after damage or destruction occasioned by fire, windstorm, or other cause for which insurance money shall be payable, and prosecuting the same thereafter with such dispatch as may be necessary to complete the same within fifteen (15) months after the occurrence of such damage or destruction occasioned as aforesaid, then the amount so collected, or the balance thereof remaining in the joint account, as the case may be, shall be paid to the Lessor and it will be at the Lessor's option to terminate the lease and retain such amount as liquidated and agreed upon damages resulting from the failure of the Lessee to promptly, within the time specified, complete such work of reconstruction and repair. The fifteen (15) month period herein provided for reconstruction shall be enlarged by delays caused without fault or neglect on the part of the Lessee by act of God, strikes, lockout, or other conditions (other than matters of finance) beyond the control of Lessee.

HORNSTEIN, WAYNE, FERGUSON & STEINBERG
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]

(5) Direct Repayment. The foregoing notwithstanding, in the event the insurance proceeds are the sum of Twenty Five Thousand and No/100 Dollars ($25,000.00) or less, then such proceeds shall be paid directly to the Lessee without the necessity of creating the joint bank account as hereinabove set forth, and Lessee shall use such funds to make the replacements or repairs as required hereunder.

7.3 Lessee's Covenant to Pay Insurance Premiums. The Lessee covenants and agrees with Lessor that the Lessee will pay premiums for all of the insurance policies which the Lessee is obligated to carry under the terms of this lease, and will deliver to the Lessor evidence of such payments before the payment of any such premiums become in default, and the Lessee will cause renewals of expiring policies to be written and the policies or copies thereof, as the lease may require, to be delivered to Lessor at least ten (10) days before the expiration date of such expiring policies.

7.4 Indemnification.

(a) Defense and Payment of Claims. Lessee agrees to defend, indemnify and hold Lessor harmless together with all of its servants, agents, or employees, from and against all liability or loss for injuries to or deaths of persons or damages to property caused by Lessee's acts or omissions to act, use of, or occupancy of the leased land, or as the result of Lessee's operations on said leased land. Each party hereto shall give to the other parties prompt and timely notice of any claim or suit instituted coming to its knowledge which in any way, directly or indirectly, contingently or otherwise, affects or might affect another party, and all parties shall have the right to participate in the defense of the same to the extent of each parties' own interest.

HORENSTEIN WYNNE FERGUSON & STOUMEN
ATTORNEYS AT LAW
[illegible]

(b) Mechanic's Liens. In the event any mechanic's or other liens or orders for the payment of money shall be filed against the leased land or any building or improvements thereon by reason of or arising out of any labor, material furnished or alleged to have been furnished, or to be furnished to or for Lessee on the leased land, or for or by reason of any change, alteration, or addition of the cost or expense thereof, or any contract relating thereto, or against the Lessor as owner thereof, Lessee shall, within thirty (30) days after it receives notice or knowledge thereof, either pay or bond the same or provide for the discharge thereof in such manner as may be provided by law. Lessee shall also defend on behalf of Lessor at Lessee's sole expense, any action, suit or proceeding which may be brought thereon, or for the enforcement of such liens, or orders, and Lessee shall pay any damage and discharge any judgment entered therein and save harmless Lessor from any and all claims or damages resulting therefrom. Lessor reserves the right, however, to defend or to direct the defense of any such suit or proceedings. Lessee shall pay all expenses of such defense, including attorney's fees, and shall pay any damage and discharge any judgment entered therein and save Lessor harmless from any and all claims or damages resulting therefrom.

(c) Resisting Claims. In the event Lessee shall desire to resist any mechanic's or materialmen's liens, or any other claim against the hereinabove described premises on account of building, rebuilding, repairing, reconstruction or otherwise improving the leased land, Lessee shall have the right to do so, provided Lessee shall first place funds into escrow in an amount sufficient to pay said claim or lien, with said escrow directed to pay such claim or lien in the event of a result adverse to Lessee.

HORENSTEIN WYNN FERGUSON & STOLMAR
ATTORNEYS AT LAW

7.5 Insurer Qualified. The insurer shall be qualified and authorized through the Department of Insurance of the State of Idaho.

ARTICLE 8
TAXES, ASSESSMENTS, LIENS AND ENCUMBRANCES

Lessee shall be responsible to pay and discharge all existing and future taxes and assessments which are or may become a lien upon or which may be levied by the State, County or any other tax levying body upon the leased land or improvements thereon or property located on the leased land. Lessee shall also be responsible for all insurance premiums, and for all liabilities, charges, fees, obligations, liens and encumbrances associated with or relating to the existence and use of the leased land including, but not limited to, all assessment installments due or payable after the date of this lease. All payments of taxes or assessments or both, except permitted installment payments, shall be prorated for the initial lease year and for the year in which the lease terminates. Lessee may, in its own name, or to the extent necessary under Lessor's name, contest in good faith by all appropriate proceedings, the amount, applicability or validity of any tax, assessment or fine pertaining to the leased land, or to any building, structure or improvement upon the leased land, and in the event Lessee does in good faith contest the applicability or validity of any tax, assessment or fine, Lessor will cooperate in such contest whenever possible with Lessee; provided that such contest will not subject any part of the leased land to forfeiture or loss, except that, if at any time payment of the whole or any part of such tax, assessment or fine shall become necessary in order to prevent any such forfeiture or loss, Lessee shall pay the same or cause the same to be paid in time to prevent such forfeiture or loss.

HORNSTEIN, WYNNE, FERGUSON & STOLTZ
ATTORNEYS AT LAW
1200 [illegible] SUITE 800
P.O. BOX [illegible]
VANCOUVER, WASHINGTON [illegible]
[illegible]

ARTICLE 9

CONDEMNATION

9.1 Priority. In the event of the taking or condemnation by any competent authority for any public or quasi-public use or purpose of the whole or materially all of the demised premises at any time during the term and after any outstanding first mortgage indebtedness has been paid and satisfied, then the rights of Lessor and Lessee to share in the net proceeds of any awards for land, buildings, improvements and damages upon any such taking, shall be as follows and in the following order of priority:

(a) Lessor, at all times, regardless of when the taking occurs, shall be entitled to receive, with interest thereon, that portion of the award as shall represent compensation for the value of the demised premises, considered as vacant and unimproved land, such value being hereinafter referred to as the "land value". Lessor shall also be entitled to costs awarded in the condemnation proceeding proportionately attributable to such land value.

(b) (1) During all the term herein demised, except the last five years of the term, Lessee shall be entitled to the entire balance of the award, which balance is hereinafter referred to as "award balance".

(2) If the taking or condemnation as above set forth shall occur at any time during the last five years of the term, Lessee shall be entitled to receive out of the award, with interest thereon, the award balance, diminished by twenty percent (20%) of such award balance for each full year (and in proportion for a fraction of a year) that elapses from the first day of said five year period to the date of the vesting of title in the condemnor; the remaining award balance and interest thereon, as well as the award for land value and interest thereon, shall belong to the Lessor.

HORNSTEIN, WYNNE, FERGUSON & STOUMBIS
ATTORNEYS AT LAW
1270 MAIN ST. • SUITE 200
P.O. BOX 644

(3) For the purpose of computing the last five years of the term within the meaning of subparagraphs (1) and (2) above, it is agreed that said "last five years" shall mean the last five years of the original term, or if, at or prior to the date that the award or the first partial payment thereof (if there be such partial payments) becomes payable, the parties shall have duly agreed to extend the term of this lease pursuant to the options to renew herein contained or by a written instrument executed in the manner required for recording, then said last five years shall be deemed to mean the last five (5) years of the term as so extended.

(c) If the values of the respective interests of Lessor and Lessee shall be determined according to the provisions of subdivisions (a) and (b) of this Section in the proceeding pursuant to which the demised premises shall have been taken or condemned, the values so determined shall be conclusive upon Lessor and Lessee. If such values shall not have been thus separately determined, such values shall be fixed by agreement between the Lessor and Lessee or if they are unable to agree, then the controversy shall be resolved by arbitration under the procedure to govern in Arbitration as set forth in this lease hereof under Article 13.

(d) In the event of the taking in condemnation of less than the whole of the demised premises but materially all of said premises as hereinbelow defined and the part of the premises that remains includes a part of the improvement that was taken, then as to the untaken remainder of the improvement only, but not any remaining land, the parties shall endeavor to agree on the then fair market value of such remainder of the improvement, and if they fail to agree then the controversy shall be resolved by arbitration. The value so agreed upon as the then fair market value of such

HORENSTEIN, WYNNE, FERGUSON & STOUMBIS
ATTORNEYS AT LAW
[illegible]
P.O. BOX 694
[illegible]

remainder of the improvement or as determined in arbitration, but diminished in the same manner as provided for in "(b)" above relative to an "award balance", shall be paid by Lessor to Lessee, and until paid shall be a charge on the share of the award for land value to which Lessor shall be entitled in the condemnation proceeding.

(e) If title to the whole or materially all of the demised premises shall be taken or condemned, this lease shall cease and terminate as to the provision so taken and shall terminate as to the entire parcel if in Lessee's judgment the taking materially and substantially affects the use and value of the remainder of the demised premises.

ARTICLE 10

DEFAULT PROVISIONS; REMEDIES; ATTORNEY'S FEES

10.1 Default by Lessee. Each of the following shall be deemed an event of default by Lessee and a breach of this lease:

(a) Rent or Other Payments. If Lessee shall default in the payment of rent or other payments hereunder when due according to the terms of this lease and does not fully correct the same within thirty (30) days after written notice thereof to Lessee.

(b) Other Covenants or Conditions. If Lessee shall default in the performance or observance of any other covenant or condition of this lease or of any note, mortgage, Deed of Trust, or other document relating to the financing of the hospital to be performed or observed by Lessee, whether or not Lessor is a party to any such documents, and does not fully correct the same within 30 days after notice thereof to the Lessee.

(c) Abandonment. Abandonment of the premises.

(d) Bankruptcy Proceedings. If during the Term of this lease, Lessee shall:

HORENSTEIN, WYNNE, FERGUSON & STOUMBIS
ATTORNEYS AT LAW
1220 MAIN ST • SUITE 300
P.O. BOX 694
VANCOUVER, WASHINGTON

(i) Appointment of Receiver. Apply for or consent in writing, signed on behalf of Lessee or its duly authorized attorney, to the appointment of a receiver, trustee or liquidator of the Lessee or of all or a substantial part of Lessee's assets; or

(ii) Voluntary Bankruptcy. File a voluntary petition in bankruptcy or admit in writing its inability to pay its debts as they become due; or

(iii) Assignment for Creditors. Make a general assignment for the benefit of creditors; or

(iv) Reorganization or Arrangement. File a reorganization or arrangement with creditors to take advantage of any insolvency law; or

(v) Admit Insolvency. File an answer admitting the material allegations of a petition filed against Lessee in any bankruptcy, reorganization or insolvency proceeding, or during the Term of this lease, an order, judgment or decree shall be entered by any court of competent jurisdiction, on the application of a creditor, adjudicating Lessee bankrupt or insolvent or approving a petition seeking a reorganization of Lessee or appointing a receiver, trustee or liquidator of Lessee, or of all or a substantial part of its assets.

10.2 Remedies. In the event of any breach or default of this lease by Lessee, then Lessor, besides other rights of re-entry may continue professional services to the patients of the hospital and use of the property upon the premises for these purposes.

HORENSTEIN, WYNNE, FERGUSON & STOUMBO
ATTORNEYS AT LAW
1250 MAIN ST • SUITE 300
P.O. BOX 98
VANCOUVER, WASHINGTON 98666

Should Lessor elect to re-enter as herein provided, or should Lessor take possession pursuant to legal proceedings, or pursuant to any notice provided for by law, Lessor may either terminate this lease or Lessor may from time to time, without terminating this lease, relet said premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Lessor in Lessor's sole discretion may deem advisable, with the right to make alterations and repairs to the premises. Rentals received by Lessor from such reletting shall be applied: first, to payment of any indebtedness, other than rent, due Lessor hereunder from Lessee; second, to the payment of rent due and unpaid hereunder; third, to the payment of any costs of such reletting; fourth, to the payment of the cost of any alterations and repairs to the premises made necessary by Lessee's breach of the provisions of this lease; and the residue, if any, shall be held by Lessor and applied in payment of future rent as the same may become due and payable hereunder. Should such rental received from such reletting be less than the rental agreed to be paid that month by Lessee hereunder, then Lessee shall pay such deficiency to Lessor. Such deficiency shall be calculated and paid monthly. No such re-entry or taking possession of the premises by Lessor shall be construed as an election on Lessor's part to terminate this lease unless a written notice of such intention is given to Lessee or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Lessor may at any time thereafter elect to terminate this lease for such previous breach.

Should Lessor at any time terminate this lease for any breach, in addition to any other remedy Lessor may have, Lessor may recover from Lessee all damages Lessor may incur by reason of such breach, including the costs of recovering the premises, and including the worth at the time of such termination of the

HORNSTEIN, WYNNE, FERGUSON & SI
ATTORNEYS AT LAW
P.O. BOX

excess, if any, of the amount of rent, additional rent and charges equivalent to rent reserved in this lease for the remainder of the Term over the then reasonable rental value of the premises for the remainder of the Term. The remedies herein given to Lessor shall be cumulative, and the exercise of any one remedy by Lessor shall not be to the exclusion of any other remedy. With previous written notice or demand, separate actions may be maintained by Lessor against Lessee from time to time to recover any rent or damages which, at the commencement of any such action, has become due and payable to Lessor without waiting until the end of the Term of this lease.

10.3 Attorney's Fees. In the event suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant herein contained to be kept or performed, the prevailing party shall be paid a reasonable attorney's fee by the other party, and such attorney's fee shall be deemed to have accrued at the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.

ACTICLE 11
COVENANTS AND WARRANTIES

Except as otherwise expressly provided in this lease, lessee agrees to take possession of the leased land in an "as is" condition, provided however, that Lessor covenants, represents and warrants as follows:

11.1 Title. That Lessor has good and marketable title to the leased land and said title is free and unencumbered. Lessor's right, title and interest in and to the leased land, except for this lease and for any lien or indebtedness incurred pursuant to Article 4, shall not be subordinated to any other claim or interest of Lessee or to any other claim or interest of

HORNSTEIN WYSONG, FERGUSON & STOUMBOS
ATTORNEYS AT LAW
P.O. BOX
179 of 447

any mortgagee or other creditor in connection with the financing of the improvements to be constructed on the leased premises.

11.2 Right to Execute. That Lessor has full right and power to execute and perform this lease and to grant the estate leased herein and the rights, easements, privileges, appurtenances and hereditaments belonging or pertaining thereto, including air-rights.

11.3 Peaceful Enjoyment. That Lessee, on paying the rent herein reserved and performing the covenants and provisions hereof on its part to be performed, shall peacefully and quietly have and enjoy the leased land, and all such existing or future required rights, easements, privileges, appurtenances and hereditaments belonging or pertaining thereto, including air-rights, during the Term; provided, however, that Lessor does not warrant that governmental authority may not at some time during the Term, without the consent or permission of Lessor, pass ordinances or perform acts which may be prejudicial to Lessee through no fault of Lessor; provided, however, that Lessor agrees to join with Lessee in protest or opposition to such ordinances or acts, the expenses of such opposition to be borne by Lessee.

ARTICLE 12
ASSIGNMENT, SUBLETTING AND SALE

12.1 Assignment, Subletting and Sale. Lessee may not assign or sublet this lease agreement without the prior written consent of Lessor, which consent shall not be unreasonably withheld; provided, however, that in the event Lessor gives its consent for the assignment or subletting of this lease, Lessor is bound only by such obligations and enjoys such rights and privileges as are set forth in this lease. It is expresssly agreed that Lessor may require, as a condition of such consent, that the officers of the Lessee corporation agree to be person-

HORENSTEIN WYANT, FERGUSON & STOLARSKI
ATTORNEYS AT LAW
PO BOX

ally liable for the performance of all obligations and covenants of Lessee's assignee(s) or subtenant(s) under this Lease. In the event Lessee shall determine to sell all or any portion of the hospital, and/or any additions or expansions thereto or thereof, Lessor shall be ~~permitted~~ granted first right of refusal to purchase the hospital as the fair market value which, unless agreed upon by the parties, shall be determined by an M.A.I. real estate appraiser appointed and paid by Lessor. If Lessee is not satisfied with the fair market value appraisal submitted by the appraiser selected by Lessor, Lessee may, at its own expense and within twenty (20) days of the receipt of the appraisal, select an M.A.I. real estate appraiser who, together with the appraiser selected by Lessor, shall choose a third such appraiser whose fees shall be shared equally by Lessor and Lessee. If Lessee fails to select a second appraiser within the time allowed, the single appraiser appointed shall be the sole appraiser and shall set the fair market value of the hospital. If Lessee does timely act, and a majority cannot agree as to the fair market value of the hospital, the three (3) appraisals shall be added together and their total divided by three (3). The resulting quotient shall be the fair market value of the hospital for the purpose of this purchase option.

ARTICLE 13

ARBITRATION; APPOINTMENT

13.1 Arbitration. Either party may require the arbitration of any matter arising under or in connection with this lease. Arbitration is initiated and required by giving notice specifying the matter to be arbitrated. If action is already pending on any matter concerning which the notice is given, the notice is ineffective unless given before the expiration of thirty (30) days after service of process on the person giving the notice.

Except as provided to the contrary in these provisions on arbitration, the arbitration shall be in conformity and subject

HORENSTEIN, WYNNE, FERGUSON & STOUMBO
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 300
P.O. BOX 780

to applicable rules and procedures of the American Arbitration Association. The arbitrators shall be bound by this lease. Pleadings in any action pending on the same matter shall, if the arbitration is required or consented to, be deemed amended to limit the issues to those contemplated by the rules prescribed above. Each party shall pay half the cost of arbitration including arbitrator's fees. Attorneys' fees shall be awarded as separately provided in this lease.

13.2 Appointment. Appointment shall be made in the manner required for the appointment of arbitrators unless expressly provided to the contrary in the applicable provisions of this lease.

There shall be three (3) arbitrators appointed as follows:

(a) Within twenty (20) days after notice requiring arbitration, each party shall appoint one (1) arbitrator and give notice of the appointment to the other party.

(b) The two (2) arbitrators shall choose a third arbitrator within thirty (30) days after appointment of the second.

(c) If either party fails to appoint an arbitrator, or if the two (2) arbitrators fail to choose a third, the appointment shall be made by the then presiding judge of the Superior Court for the county in which the premises are located, acting in his individual and nonofficial capacity on the application of either party and on (30) days' notice to the other party; provided that either party may, by notice given before commencement of the arbitration hearing, consent to arbitration by the arbitrator appointed by the other party. In that event, no further appointments of arbitrator shall be made and any other arbitrators previously appointed shall be dismissed.

HORENSTEIN WYANT FERGUSON & STOUMBO
ATTORNEYS AT LAW
1220 MAIN ST, SUITE 300
P.O. BOX 650

ARTICLE 14

MISCELLANEOUS PROVISIONS

14.1 Exercise of Renewal Option. Lessee may exercise its option to extend the Term granted under Article I, paragraph 1.2, hereof, by giving Lessor written notice thereof not later than 120 days prior to the expiration date of the Term. Any option so exercised shall extend the lease on the same terms as are in effect at the time of the exercise of such options, subject to adjustment and notification in accordance herewith.

14.2 Inspection by Lessor. Lessor may enter upon the leased land at any reasonable time for any purpose necessary, incidental to or connected with verifications of the performance of Lessee's obligations hereunder, but subject to any provisions with respect thereto otherwise contained herein.

14.3 Negation of Partnership. Nothing in this lease shall be construed to render the Lessor in any way or for any purpose a partner, joint venturer, or associate in any relationship with Lessee other than that of landlord and tenant, nor shall this lease be construed to authorize either to act as agent for the other except as expressly provided to the contrary in this lease.

14.4 Controlling Law. This lease shall be deemed to be made and shall be construed in accordance with the laws of the State of Idaho.

14.5 Surrender of Possession. Lessee agrees to yield and deliver to Lessor possession of the demised land at the termination of this lease or as otherwise provided herein, in good condition and in accordance with the express obligations provided herein, except for reasonable wear and tear, and Lessee shall execute and deliver to Lessor a good and sufficient document of relinquishment, if and when requested.

14.6 Successors. This lease shall bind and inure to the benefit of any successor or assignee of Lessor and any successors or assignees of Lessee whether resulting from any merger,

HORENSTEIN, WYANT, FERGUSON & STOLTZ
ATTORNEYS AT LAW
P.O. Box
VANCOUVER, WASHINGTON

consolidation, reorganization, assignment, foreclosure or otherwise.

14.7 Headings. The article and paragraph headings contained herein are for convenience and reference and are not intended to define or limit the scope of any provision of this lease.

14.8 Notices. All notices required to be given to Lessee under the terms of the lease shall be given by certified mail, return receipt requested, postage prepaid, addressed to Lessee as follows:

STERLING DEVELOPMENT CO., a
Washington partnership
1906 Broadway
Vancouver, Washington 98663

with copy to:

HORENSTEIN, WYNNE, FERGUSON & STOUMBOS
1220 Main Street, Suite 300
P. O. Box 694
Vancouver, Washington 98666

or at such other addresses as Lessee may designate in writing delivered to Lessor. Similar notice shall be addressed to Lessor as follows:

INTERMOUNTAIN HEALTH CARE, INC.
Suite 2200, 36 South State Street
Salt Lake City, Utah 84111

with copy to:

POCATELLO REGIONAL MEDICAL CENTER
777 Hospital Way
Pocatello, Idaho 83201

Attention: Chris Anton, Administrator

or at such other address as Lessor may designate in writing delivered to Lessee. Notices shall be sent in a similar manner to any mortgagee of Lessee at such address as may be designated in writing.

HORENSTEIN, WYNNE, FERGUSON & STOUMBOS
ATTORNEYS AT LAW

14.9 Amendment of Lease. Lessor and Lessee shall cooperate and include in this lease by suitable amendment from time to time any provision that may reasonably be requested by any proposed Leasehold Mortgagee for the purpose of implementing the Mortgagee protection provisions contained in this lease and allowing such mortgagee reasonable means to protect or preserve the lien of a Leasehold Mortgage on the occurrence of a default on the terms of this lease. Lessor and Lessee each agree to execute and deliver and to acknowledge if necessary for recording purposes, any agreement necessary to effect such amendment; provided, however, such amendment shall not in any way affect the term or rent under this lease nor otherwise in any respect adversely affect the rights of the Lessor in this lease.

14.10 Recording. Lessor and Lessee agree to execute and have acknowledged, and Lessee agrees to deliver to Lessor, a memorandum of this lease in the form attached hereto as Exhibit "B" for the purpose of recording such memorandum with the County Recorder of Bannock County.

IN WITNESS WHEREOF, the parties have set their hands the day and year first above written.

LESSOR:

INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation authorized to do business in Idaho, dba Pocatello Regional Medical Center

By s/ Chris J. Caston
Administrator

By _____

ATTEST:
Witness
s/ Donald W Allison

HORENSTEIN, WYNNE, FERGUSON & STEDMAN
ATTORNEYS AT LAW
1220 MAIN ST. - SUITE 300
P.O. BOX 644
VANCOUVER, WASHINGTON 98666

~~LESSEE:~~

STERLING DEVELOPMENT CO., a Washington partnership

By S/
M. L. CANCELOSI

By S/
JOHN R. YUDITSKY

~~ATTEST:~~
Witness
S/ Linell W Allen

STATE OF Idaho)
: ss.
County of Bannock

On this 27th day of January, 1983, before me, the undersigned, a Notary Public in and for said State, personally appeared Chris J. Anton ~~and~~ _____ known to me to be the ~~President and Secretary, respectively~~ Representative, of INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation authorized to do business in Idaho, dba Pocatello Regional Medical Center, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

S/
NOTARY PUBLIC in and for the State of Idaho, residing at Pocatello

HORENSTEIN, WYNNE, FERGUSON & STOUT
ATTORNEYS AT LAW
1220 MAIN ST • SUITE 200
P.O. BOX 670

STATE OF IDAHO)
: ss.
County of Bannock)

On this 27th day of January, 19 83, before me, the undersigned, a Notary Public in and for said State, personally appeared M. L. CANCELOSI and JOHN R. YUDITSKY, known to me to be the General Partners of STERLING DEVELOPMENT CO., a Washington partnership, the partnership that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC in and for the State of Idaho, residing at Pocatello

P.01

TRANSACTION REPORT

NOV-27-2012 TUE 04:23 PM

FOR: MERRILL & MERRILL 208 232 2499

SEND

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
NOV-27	04:23 PM	5299732	34″	3	FAX TX	OK	718	

TOTAL : 34S PAGES: 3

Merrill & Merrill
P.O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2286
Fax: (208) 232-2499

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: **208-529-9732**

Number of pages in addition to this cover sheet: 2

To: Michael D. Gaffney

Of: BEARD ST. CLAIR

From: Dave R. Gallafent/Gayla

Client/Matter: ***Pocatello Hospital v. Quail Ridge, et al***
Bannock County Case No. CV-10-2724-OC

Date: November 27, 2012

COMMENTS: Attached hereto please find my letter dated November 27, 2012 pursuant to the above-referenced matter. Please contact our office with any questions, thank you.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.
IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (208) 232-2286.

EXHIBIT
5

Merrill & Merrill
P.O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2286
Fax: (208) 232-2499

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: **208-529-9732**

Number of pages in addition to this cover sheet: 2

To: Michael D. Gaffney

Of: BEARD ST. CLAIR

From: Dave R. Gallafent/Gayla

Client/Matter: ***Pocatello Hospital v. Quail Ridge, et al***
Bannock County Case No. CV-10-2724-OC

Date: November 27, 2012

COMMENTS: Attached hereto please find my letter dated November 27, 2012 pursuant to the above-referenced matter. Please contact our office with any questions, thank you.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.
IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (208) 232-2286.

DAVE R. GALLAFENT
KENT L. HAWKINS*
BRENDON C. TAYLOR
KENT A. HIGGINS*
JARED A. STEADMAN
R. WILLIAM HANCOCK
TYLER H. NEILL

*ALSO ADMITTED IN UTAH

MERRILL & MERRILL
CHARTERED
COUNSELORS AND ATTORNEYS AT LAW
109 N. ARTHUR - 5TH FLOOR
P.O. BOX 991
POCATELLO, IDAHO 83204-0991

A.L. MERRILL (1886-1961)
R.D. MERRILL (1893-1972)
W.F. MERRILL (1919-2005)

TELEPHONE:208-232-2286
FAX:208-232-2499

Founded in 1913

November 27, 2012

Via Facsimile: 529-9732
Michael D. Gaffney
Bread St. Clair
2105 Coronado St.
Idaho Falls, ID 83402

Re: Pocatello Hospital, LLC vs. Quail Ridge Medical Investors, LLC
(Bannock County Case No. CV-2010-0002724-OC)

Dear Mike:

We are in receipt of Judge Brown's Amended Declaratory Judgment entered yesterday in the above-referenced action, which judgment declares that your client "is obligated to promptly pay PMC $416,812.50 under the terms of the parties' Ground Lease Agreement." Accordingly, formal demand is hereby made on Quail Ridge and/or Forest Preston, individually, to "promptly" pay that amount to PMC.

Although we acknowledge receipt of your Notice of Appeal, we do not believe that the filing of such appeal has any impact on PMC's right to immediate payment of the past due rent which has now been declared by the Court as currently due and owing. Quail Ridge is obligated to make prompt payment of this amount under the terms of the parties' Ground Lease Agreement and Forest Preston, individually, is liable for this past due rent amount pursuant to the 2001 Guarantee of Payment and Performance executed by him.

As such, Quail Ridge and Forest Preston, individually, are hereby put on notice that if payment to PMC in the amount of $416,812.50 is not made within ten days, then PMC will consider Quail Ridge in breach of its rent obligations under the Ground Lease Agreement and Forest Preston in breach of his payment obligations under the Guarantee of Payment and Performance. If you do not consider yourself as legal counsel for Mr. Preston and are not authorized to accept this demand for payment on his behalf, please let us know as soon as possible so that we can make direct demand upon him. Quail Ridge and Mr. Preston should be aware that if full payment is not received within ten days, PMC will seek all legal remedies available to it under Idaho law, including but not limited to filing a legal action for collection of this outstanding rent. If such legal action becomes necessary, PMC will seek attorneys fees pursuant to Section 10.3 of the

Ground Lease Agreement; pursuant to the terms of the Guarantee of Payment and Performance; and, pursuant to Idaho Code §§ 12-120 to 12-121 and 12-123. Quail Ridge should take particular note that Section 10.3 of the Ground Lease Agreement provides that "such attorney's fee shall be deemed to have accrued at the commencement of such action and shall be paid whether or not such action is prosecuted to judgment." Forest Preston should take note that the Guarantee of Payment and Performance executed by him specifically provides that "the undersigned further agrees, without demand, immediately to reimburse and pay for all costs and expenses, including reasonable attorneys' fees, incurred in the enforcement of this Guarantee."

Additionally, pursuant to Idaho Code § 28-22-104, interest is accruing on the amount due at 12% per annum.

For your information, PMC is in the process of appraising the Quail Ridge Property to determine the rental rate for the 2013 rent adjustment period. We will share the appraisal with you as soon as we receive it.

In the meantime, if you have questions or if you wish to make additional arrangements for the payment of the remaining rent due for the 2010 rent adjustment period, or if you have any input regarding the market value of the property for the 2013 rent adjustment period, please do not hesitate to contact me or Kent Hawkins.

Sincerely,

MERRILL & MERRILL, CHTD.

Dave R. Gallafent
DRG/RWH/5975

cc: Client (via e-mail)

FORREST L. PRESTON,

called as a witness at the instance of the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. HAWKINS:

Q My name is Kent Hawkins. I'm one of the three attorneys representing the Pocatello Medical Center in this case. If the witness would please state your full name for the record.

A Forrest L. Preston.

Q And what is your, what is your address there?

A Business address?

Q Business would be fine.

A Okay. 3001 Keith, K-E-I-T-H, Street, Cleveland, Tennessee.

Q All right. Tell me a little -- and let's just briefly -- a little bit about yourself starting with -- well, we're hearing it in a little different order. I understand there's two corporations in this suit. I'm going to -- if I refer to them as Quail Ridge and Century Park, is it clear to you of the two entities that I'm speaking of?

A Yes.

IN THE DISTRICT COURT OF THE SIXTH
JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, LLC, Defendants.	ORIGINAL NO: CV-10-2724 OC

Cleveland, Tennessee
April 11, 2012

DEPOSITION OF FORREST L. PRESTON

APPEARANCES:

FOR THE PLAINTIFF:

KENT L. HAWKINS, ESQ.
Merrill & Merrill, Chartered
109 North Arthur, 5th Floor
P. O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2286
(Appearing via Skype)

FOR THE DEFENDANTS:

MICHAEL D. GAFFNEY, ESQ.
Beard, St. Clair, Gaffney, P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404
(208) 557-5203
(Appearing via Skype)

ALSO PRESENT: Richard D. Faulkner, Jr., Esq.
Richard J. McAfee, Esq.
Joanna Crooks
Aaron Webb, Esq.

EXHIBIT
6 of 447 6

Q And do you hold positions in both of these corporations?
A Yes.
Q What are -- what is your position in each, each of those companies?
A Quail Ridge is the ownership entity of the actual building itself and operation. Century Park is a management company that I formed about six years ago with my youngest son, Bryan.
Q So when you say that you formed Century Park, are you the sole owner of Century Park?
A I share an ownership with my youngest son, Bryan, yes.
Q I missed that. Who do you share ownership with?
A My youngest son, Bryan. B-R-Y-A-N.
Q Just the two of you?
A Yes.
Q All right. Would the same be true of Quail? Who are the owners of Quail?
A I have not reviewed that recently, but I believe that I am a 99 percent owner, and there is a one percent ownership of which --
By the way, our video went off here, so I don't know if that's meaning -- can you still hear

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 SEP -5 PM 1:07
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **AFFIDAVIT OF DON WADLE**

STATE OF IDAHO)
: ss
County of Bannock)

Don Wadle, being first duly sworn, deposes and states that:

1. I am currently a vice-president of Portneuf Medical Center, LLC (PMC), the plaintiff herein, and I have personal knowledge of the facts stated below

2. Quail Ridge Medical Investors, LLC ("Quail"), has not paid to PMC the $416,812.50 in unpaid adjusted rents for the 2010 rent adjustment period.

3. Forrest L. Preston has not paid to PMC the $416,812.50 in unpaid adjusted rents for the 2010 rent adjustment period.

DATED this 5th day of September, 2013.

Don Wadle

SUBSCRIBED AND SWORN to before me by Don Wadle on this 5th day of September, 2013.

(SEAL) DEBORAH LAFANA
NOTARY PUBLIC
STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at: Pocatello, ID
Commission expires: 12-5-17

CERTIFICATE OF SERVICE

I, R. William Hancock, the undersigned, one of the attorneys for the Plaintiff, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 5th day of September, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile

Judge Robert C. Naftz
624 E. Center, Rm. 220
Pocatello, ID 83201
(Chambers Copy)

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Telefax 547-2147

R. William Hancock

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 SEP 23 PM 3:29
BY
DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Defendants' Cross-Motion for Summary Judgment

Defendants, by and through counsel of record and pursuant to I.R.C.P. 56, respectfully move this Court for summary judgment dismissing the above-entitled case. The basis for this motion is set forth in the memorandum and affidavit filed contemporaneously herewith.

Oral argument is requested.

DATED: September 23, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on September 23, 2013, I served a true and correct copy of the DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☑ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☑ Hand-delivered ☐ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 SEP 23 PM 3:30
BY DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Defendants' Memorandum in Support of Cross-Motion for Summary Judgment

The defendants (collectively Quail Ridge) through counsel of record, Beard St. Clair Gaffney PA, respectfully submit the following Memorandum in Support of their Cross-Motion for Summary Judgment.

Introduction

The plaintiff, Pocatello Hospital, LLC dba Portneuf Medical Center, LLC (PMC), has already sued Quail Ridge for breach of contract. PMC lost its case for breach of contract. In fact, PMC *voluntarily agreed* to dismiss its claim for breach of contract when Bannock County Civil Case No. 10-2724 was tried to Judge Brown. The doctrines of res judicata and collateral

estoppel forestall PMC's claims in this litigation. Quail Ridge is entitled to summary judgment dismissing the case.

Legal Standard

A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." IDAHO R. CIV. P. 56(c) (2011); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991). It is recognized that the court must draw all facts and inferences in favor of the non-moving party. *G&M Farms*, 119 Idaho at 517, 808 P.2d at 854 (1991); *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994); *Haessley v. Safeco Title Ins. Co. of Idaho,* 121 Idaho 463, 825 P.2d 1119 (1992).

The moving party bears the burden of establishing the lack of an issue of material fact. If the moving party fails to show this then summary judgment should be denied. *Tingley v. Harrison,* 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). The non-moving party is entitled to show a genuine issue of material fact regarding the elements challenged by the moving party's motion. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990), *citing*, *Celotex v. Catrett*, 477 U.S. 317 (1986); *see also Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

If reasonable people could reach different conclusions or inferences from the evidence, the motion for summary judgment should be denied. *Thompson v. Pike*, 125 Idaho 897, 900, 876 P.2d 595, 598 (1994); *Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986). "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review[.]" *Lewiston Indep. Sch. Dist. #1 v. City of Lewiston*, 264 P.3d 907, 911 (Idaho 2011).

Statement of Facts

1. PMC filed a Verified Complaint against Quail Ridge and Century Park on June 28, 2010. (Avondet Aff. Ex. A.) The case was assigned the Bannock County Civil Case number of 10-2724.[1] The Verified Complaint alleged facts and the legal claim that Quail Ridge and Century Park were successors-in-interest to a certain Ground Lease Agreement that had been entered into by Intermountain Health Care, Inc. (IHC) and Sterling Development Co. (Sterling) in 1983. (*Id.*) The Ground Lease Agreement pertained to real property located within the City of Pocatello. (*Id.*) The Verified Complaint attached a copy of the Ground Lease Agreement.

2. PMC sought relief from both Quail Ridge and Century Park for breach of contract. Specifically, PMC alleged that Quail Ridge and Century Park had breached Section 1.3(a) & 1.3(b) of the Ground Lease Agreement. (*Id.*) Section 1.3(a) of the Ground Lease Agreement provides:

   An initial annual rental shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre.

   (*Id.*)

3. Section 1.3(b) of the Ground Lease Agreement provides:

   The annual net rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date. . . . The rent as adjusted shall be equal to fifteen percent (15%) of the fair market value of the leased land, exclusive of the improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. *The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applies to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the*

[1] CV-10-2724 will hereafter be referred to as *PMC I.*

purpose of adjustments for periods preceding the applicable rent adjustment date. (emphasis added)

If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.

(*Id.*)

4. In *PMC I*, PMC alleged that Quail Ridge had breached the Ground Lease Agreement by not paying adjusted rent pursuant to Section 1.3(b) of the Ground Lease Agreement for the adjustment periods of 2007 and 2010. (*Id.*)

5. Quail Ridge and Century Park filed an Answer and Jury Demand to the *PMC I* Verified Complaint on August 2, 2010. (*Id.* Ex. B.) Trial was subsequently scheduled by Judge Brown to commence in May 2012.

6. PMC filed an Amended Complaint in the *PMC I* case on May 4, 2012, just days before trial. (Avondet Aff. Ex. C.) PMC added a count for Declaratory Relief; however, PMC continued to assert a claim for breach of contract against Quail Ridge and Century Park for the 2007 and 2010 adjustment periods. (*Id.*)

7. Paragraphs 14 through 34 of the Amended Complaint articulate the grounds that PMC believed gave rise to a claim for breach of contract against Quail Ridge and Century Park. (*Id.*) Those paragraphs generally identify the failure of Quail Ridge and Century Park to pay adjusted rent as set forth therein as the basis for the breach of contract claims. (*Id.*)

8. Ultimately, Judge Brown held a court trial in *PMC I* on May 14-15, 2012. (Avondet Aff. Ex. D.) After the close of PMC's case-in-chief Quail Ridge and Century Park moved for a directed verdict on Count I of the Amended Complaint. (*Id.* Ex. D.) Count I was the breach of contract claims for both the 2007 and 2010 adjustment periods. (Avondet Aff. Ex. C.)

9. After hearing some argument in support of the directed verdict motion, counsel for PMC said the following the Judge Brown:

> MR. HAWKINS: I can probably stipulate on this and save a little time. I agree exactly with what Mr. Gaffney is saying. That hasn't been our strategy in the trial. We feel that the way we have alleged the complaint, and especially with the amendment for the declaratory judgment, which effectively becomes the adjustment process that we're alleging, then that adjustment process itself results in the payments of the fair market value on the property for the years 2007 to current. So we would withdraw the first count regarding a breach of contract and damages from a breach.
>
> (Avondet Aff. Ex. E; *PMC I* Trial Tran. Vol. II, 86:1-12, May 15, 2012.)

10. During trial, Richard Faulkner, Quail Ridge's corporate representative, testified about a restructuring of the parties' arrangement in 2001. (*Id.*, 153:8-11.) Sterling sought to sell the building. Forrest Preston, PMI and Quail Ridge's owner, wanted to buy the building. (*Id.*, 153:12-21.) Sterling's principals wanted to be released from their guarantees of the Ground Lease and also wanted Sterling released from the financing on the building. (*Id.*) Sterling owed approximately $2.8 million on the building. (*Id.*, 154:1-4.)

11. The 2001 restructure resulted in Quail Ridge stepping into Sterling's shoes vis-à-vis the Ground Lease. (*Id.*, 154:18-155:4.) The parties amended and restated the old sublease with Quail Ridge becoming the sublessor and PMI remaining as subtenant. (*Id.*, 155:9-16.)

12. Among other various additions to the parties' relationship, Forrest Preston's personal guarantee was executed attendant to the 2001 restructuring. (*Id.*, 165:19-21.)

13. Judge Brown granted Quail Ridge and Century Park's motion for directed verdict on breach of contract for both 2007 and 2010. (*Id.* Ex. D.) Century Park moved to be dismissed entirely from the *PMC I* litigation. That motion was also granted. (*Id.*)

14. On November 12, 2012, the Judge Brown entered an Order on Form of Judgment. (Avondet Aff. Ex. F.) The order stated that during the first trial there had been "no evidence that Quail Ridge was in violation or had breached the terms of the Ground Lease Agreement." (*Id.*)

The Court concluded that there were "absolutely no facts in the record that would justify this Court entering a money judgment in favor of the Plaintiff." (*Id.*)

15. Judge Brown ultimately denied PMC's request to adjust rent for the 2007 adjustment period. (Hancock Aff. Ex. 1, ¶¶ 40 & 41.)

Argument

1 Res judicata bars PMC's claim for breach of contract

1.1 Res judicata bars PMC's claim against the Quail Ridge entity

PMC I involved claims for breach of contract for 2007 and 2010. Those claims were fully adjudicated by Judge Brown and dismissed. (Avondet Aff. Ex. D.) Since PMC previously sued for breach of contract and lost it should not be allowed to come before this Court and relitigate the issue in an effort to reduce the 2010 adjustment period to a money judgment.

Res judicata "includes two legal concepts—issue preclusion or collateral estoppel and claim preclusion." *Berkshire Investments, LLC v. Taylor*, 278 P.3d 943, 951 (Idaho 2012). "Claim preclusion 'bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action.'" *Id.* In *Berkshire Investments, LLC*, the Court wrote:

> Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (2) (sic) the present claim arises out of the same transaction or series of transactions. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 125-27, 157 P.3d 613, 618-20 (2007)

Id.

Collateral estoppel, or issue preclusion, bars relitigation of an issue when:

> (1) The party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the

prior litigations; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Id. Both doctrines apply to this case and, specifically, res judicata bars PMC's claim against Quail Ridge in this lawsuit.

In this case, the parties are the same as those involved in *PMC I.* PMC sued Quail Ridge in *PMC I* for breach of contract. (Avondet Aff. Ex. A.)[2] Thus, the res judicata prerequisite of identical parties is present here.

The claims asserted are identical. The factual allegations contained in the Amended Complaint alleged that there was an adjusted rent that Quail Ridge failed to pay for the 2010 rent adjustment period. (Avondet Aff. Ex. C.) PMC asserted that claim through trial and had every opportunity to present evidence in support of the breach of contract. However, after PMC's evidence closed, Quail Ridge sought to have the claim dismissed and PMC remarkably agreed that it had not presented any evidence of breach of contract for the 2010 adjustment period. Judge Brown dismissed the breach of contract claim for the 2010 adjustment period. (*Id.* Ex. D.) This case involves a claim for breach of contract for the 2010 adjustment period. (*See* Compl. pp. 1-5.) The alleged failure to pay adjusted rent for 2010 forms the basis for both lawsuits. Thus, the claims are the same.

The present claim for breach of contract does involve the same transaction that was at issue in *PMC I* and is nothing more than relitigating issues that were previously decided. Res judicata relates to claims that were actually litigated and those that could have been raised in the earlier case. *Berkshire Investments, LLC*, 278 P.3d at 951. The allegations in the two cases are the same. In *PMC I*, PMC sought to recover adjusted rent in the amount of $445,500.00. (Avondet Aff. Ex. C, ¶ 34.) After offsets, PMC claimed that Quail Ridge owed "PMC a sum of not less

[2] Though PMC did not sue Preston in *PMC I*, the application of the doctrine will be discussed, *infra*.

than $416,812.50 for unpaid adjusted rent for the 2010 rent adjustment period" in *PMC I*. (*Id.*) PMC actually litigated that claim through trial, which resulted in the claim being dismissed by Judge Brown after PMC's case-in-chief.

Nothing required PMC to assert the breach of contract claim in the prior litigation. PMC could have limited its relief requested to a declaration of the parties' rights under the Ground Lease Agreement. In *Harris v. Cassia County*, 681 P.2d 988 (Idaho 1984), the Idaho Supreme Court held "that the right sought to be protected by declaratory judgment 'may invoke either remedial or preventive relief; it may relate to a right that has either been breached or is only yet in dispute or a status undisturbed but threatened or endangered; but, in either or any event, it must involve actual or existing facts.'" *Id.* at 991-92 (citing *State ex rel. Miller v. State Bd. of Educ.*, 52 P.2d 141, 144 (Idaho 1935)). However, PMC pressed its breach of contract claim and that claim ultimately failed.

Alternatively, PMC could have bifurcated the claims and had Judge Brown first declare the rights of the parties after a trial. He then could have had a separate proceeding to decide the breach of contract issue. PMC could have requested Court implement this type of procedure in *PMC I* and probably should have asked for a bifurcation in order to avoid having the breach of contract claim fully adjudicated by the Court in the prior litigation. A bifurcation would have allowed PMC to adjudicate the parties' respective contract rights and then pursue a breach of contract claim following the declaration. As it is, however, PMC sought to recover damages for the 2010 adjustment period, Judge Brown held a trial on the issue, and PMC failed to present any evidence of breach and actually stipulated to Quail Ridge's motion following the presentation of PMC's evidence. (Avondet Aff. Ex. F.) Thus, there is a final adjudication of the breach of

contract claim and PMC is precluded from relitigating that claim against Quail Ridge. *See, e.g., Silver Eagle Mining Co. v. State*, 280 P.3d 679, 682-83 (Idaho 2012).

Thus, the elements of res judicata are satisfied in this case. PMC has already litigated its breach of contract cause of action and PMC lost. It should not be allowed to come before this Court and assert a claim that a prior court ruled to lack evidence.

1.2 Res judicata applies to PMC's claim against Forrest Preston

Claim preclusion also applies to PMC's claim against Forrest Preston (Preston) on the guarantee. Because PMC originally sued Quail Ridge for breach of its obligation to pay rent under the Ground Lease Agreement PMC should also have sued Preston for breach of the guarantee. The guarantee claim was a claim that should have been brought in the prior litigation. It was not asserted at any point by PMC. Thus, claim preclusion applies not only to the parties of the original action but also to their privies. "To be a privy, 'a person not a party to the former action must derive[] his interest from one who was a party to it.'" *Berkshire Investments, LLC*, 278 P.3d at 951.

Here, Preston signed the guarantee as a part of the 2001 restructuring of the parties agreements. (Avondet Aff. Ex. E.) Indeed, PMC's own claims against Preston assert that he is a privy because PMC seeks to enforce the rent obligation vis-à-vis the guarantee. (Compl. pp. 1-5.) Thus, by suing Quail Ridge in *PMC I* for breach of contract PMC should have also sued Preston under the guarantee. *PMC I* did not involve a claim on the guarantee when it should have. Claim preclusion applies to claims brought or those claims that could have been brought in the prior litigation. *Berkshire Investments, LLC*, 278 P.3d at 951. Thus, res judicata bars PMC's present claim against Preston on the guarantee.

2 Issue preclusion applies to the guarantee

Even if the Court finds that Preston was not a privy as defined in *Berkshire Investments LLC*, it should still dismiss PMC's claim under the guarantee on the basis of issue preclusion. The elements of collateral estoppel, or issue preclusion are:

1. The party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case;
2. The issue decided in the prior litigation was identical to the issue presented in the present action;
3. The issue sought to be precluded was actually decided in the prior litigation;
4. There was a final judgment on the merits in the prior litigation; and,
5. The party against whom the issue is asserted was a party or in privity with a party to the litigation.

Berkshire Investments, LLC, 278 P.3d at 951. Each element of collateral estoppel is met in this case.

First, PMC could have, and should have, included its claim on the guarantee in the prior litigation. PMC had sued Quail Ridge for breach of the Ground Lease Agreement for the 2010 rent adjustment period. If Quail Ridge had breached the Ground Lease Agreement for that period then PMC should have invoked the guarantee and sought to recover by enforcing the guarantee against Preston. PMC chose not to do so.

Second, the issue of breach of the Ground Lease Agreement for the 2010 rent adjustment period is the same in both cases. Both cases asserted that Quail Ridge breached the Ground Lease Agreement for the 2010 rent adjustment period by refusing to pay $416,812.50, after offsets.

Third, the issue of breach of the Ground Lease Agreement was decided in the prior litigation. Judge Brown dismissed PMC's claim for breach of the agreement. (Avondet Aff. Ex. D.)

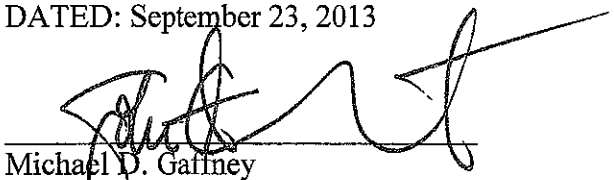
Fourth, a final judgment was entered and the claim was dismissed.

Finally, as discussed *supra*, Preston is in privity with Quail Ridge and PMC. Judge Brown found that PMC had not presented any evidence of breach of the Ground Lease Agreement. (*Id.*) By dismissing the breach of contract claim the Court disposed of any basis that PMC would have had for invoking the guarantee against Preston.

Conclusion

As a result of the foregoing, the Defendants' Cross-Motion for Summary Judgment should be granted.

DATED: September 23, 2013



Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on September 23, 2013, I served a true and correct copy of the DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☑ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☑ Hand-delivered ☐ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2018 SEP 23 PM 3:30
BY PERUN CLERK

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Affidavit of John M. Avondet in Support of Defendants' Cross-Motion for Summary Judgment

STATE OF IDAHO)

)ss.

County of Bonneville)

I, John M. Avondet, having been duly sworn on oath, depose and state:

1. I am an attorney with the law firm, Beard St. Clair Gaffney PA, and counsel of record for Defendants in the above-entitled action.

2. I am competent to testify and do so through personal knowledge.

3. Attached as Exhibit A is a true and correct copy of the Verified Complaint dated June 28, 2010.

4. Attached as Exhibit B is a true and correct copy of the Answer and Jury Demand dated August 2, 2010.

5. Attached as Exhibit C is a true and correct copy of the Amended Complaint dated May 4, 2012.

6. Attached as Exhibit D is a true and correct copy of the Minute Entry and Order dated May 15, 2012.

7. Attached as Exhibit E is a true and correct copy of excerpts of Volume 2 of 2 of a Bench Trial dated May 15, 2012.

8. Attached as Exhibit F is a true and correct copy of the Order on Form of Judgment dated November 12, 2012.

DATED: September 23, 2013

John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

Subscribed and sworn to before me on this 23rd day of September, 2013.

Notary Public for Idaho
Residing at: Idaho Falls, ID
My Commission Expires: 9/11/14
(SEAL)

JESSICA WILSON NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on September 23, 2013, I served a true and correct copy of the AFFIDAVIT OF JOHN M. AVONDET IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☒ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☒ Hand-delivered ☐ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

Dave R. Gallafent
R. William Hancock
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
ISB # 1745, 7938
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2010 JUN 28 AM 10:31
BY DEPUTY CLERK

MITCHELL W. BROWN

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, LLC, Defendants.	Case No. CV 10-2724 OC VERIFIED COMPLAINT FEE CATEGORY A FEES $ 88.00

COMES NOW the Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC, by and through its attorneys, Merrill and Merrill, Chartered, and for its action against the Defendants, Quail Ridge Medical Investors, LLC, and Century Park Associates, LLC, complains and alleges as follows:

1. Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC"), is a Delaware limited liability company authorized to do business in the State of Idaho, whose principal place of business in the State of Idaho is 651 Memorial Drive, Pocatello, Bannock County, Idaho 83201.

EXHIBIT
tabbies
A

2. Defendant, Quail Ridge Medical Investors, LLC ("Quail Ridge"), is a Tennessee limited liability company authorized to do business in the State of Idaho, whose principal place of business is 3570 Keith Street NW, Cleveland, Tennessee 37312.

3. Defendant, Century Park Associates, LLC ("Century Park"), is a Tennessee limited liability company authorized to do business in the State of Idaho, whose principal place of business is 3570 Keith Street NW, Cleveland, Tennessee 37312.

4. This lawsuit arises from a certain *Ground Lease Agreement* dated January 27, 1983 ("Lease Agreement"). PMC's copy of this Lease Agreement is attached hereto as Exhibit "1" and is incorporated herein by this reference.

5. The Lease Agreement was originally entered into between Intermountain Health Care, Inc. ("IHC"), as original lessor, and Sterling Development Co. ("Sterling"), as original lessee.

6. The Lease Agreement concerns real property located within the City of Pocatello, Bannock County, Idaho ("Leased Land"). A true and correct copy of the legal description for the Leased Land is attached hereto as Exhibit "2" and is incorporated herein by this reference.

7. On or about January 1, 1996, Sterling subleased its interest in the Leased Land to Pocatello Medical Investors Limited Partnership ("PMI"), a Tennessee limited partnership authorized to do business in the State of Idaho, whose principal place of business is 3570 Keith Street NW, Cleveland, Tennessee 37312.

8. On or about January 3, 2001, Sterling and PMI assigned their respective interests in the Leased Land and Lease Agreement to Quail Ridge and Quail Ridge thereby became the successor lessee to the Lease Agreement

9. On or about September 23, 2002, IHC assigned its interest in the Lease Agreement to IHC Health Services, Inc. and IHC Health Services, Inc., thereby became the successor lessor to the Lease Agreement.

10. On or about October 1, 2002, IHC Health Services, Inc., assigned its interest in the Lease Agreement to Bannock Regional Medical Center ("BRMC") and BRMC thereby

became the successor lessor to the Lease Agreement. Shortly thereafter, BRMC changed its name to Portneuf Medical Center.

11. On or about February 1, 2009, BRMC (then known as Portneuf Medical Center), assigned its interest in the Lease Agreement to PMC, whereby PMC became the successor lessor to the Lease Agreement.

12. To the best of PMC's knowledge and belief, Century Park is an affiliate of, or related to, Quail Ridge and may claim a Lessee's interest in the Lease Agreement.

13. Quail Ridge or Century Park or both operate a senior living facility by the name of "Quail Ridge" which facility is situated on the Lease Land.

14. When this Lease Agreement was first entered into on January 27, 1983, IHC and Sterling, as original lessor and lessee respectively, agreed upon a basis for calculating the initial annual rental. Specifically, in Article 1, Section 1.3(a) of the Lease Agreement, the original lessor and lessee agreed as follows as the basis for calculating the initial annual rental:

> . . . .
> *An initial annual rental shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre.*

15. The Leased Land is 4.25 acres and, therefore, based upon the above clear and unambiguous language, the original lessor and lessee set the initial annual rental for this Leased Land as $9,562.50 ($15,000 x 4.25 = $63,750; $63,750 x 15% = $9,562.50).

16. The annual rental rate is subject to adjustment on a periodic basis pursuant to the Lease Agreement, Article 1, Section 1.3(b), which states in relevant part:

> . . . *The annual rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date.*
> . . . .

17. The above language in Article 1 of the Lease Agreement concerning when each rent adjustment date is to occur is clear and unambiguous. Thus, the first rent adjustment date under this Lease Agreement was scheduled for January 27, 1986 and the rent was, and is, subject

to adjustment every three years thereafter until the termination of this Lease Agreement.

18. Pursuant to the foregoing schedule, the most recent rent adjustment date was January 27, 2010.

19. Although the Lease Agreement provides for period rent adjustment dates as outlined above, this Lease Agreement also clearly and unambiguously allows for retroactive adjustment of the annual rental rate when such adjustment did not occur on or before the specified rent adjustment date.

20. Specifically, Article 1, Section 1.3(b) states in relevant part:

> . . . .
> *If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.*

21. To the best of PMC's knowledge and belief, prior to PMC becoming a successor lessor to the Lease Agreement, neither IHC, IHC Health Services, Inc., nor BRMC exercised its right as lessor under this Lease Agreement to adjust the annual rental rate pursuant to Article 1 of the Lease Agreement.

22. Sometime in the summer of 2009, PMC became aware of the fact that the annual rental rate for the Leased Land had not been previously adjusted as outlined in Article 1 of the Lease Agreement.

23. Specifically, Article 1, Section 1.3(b) of the Lease Agreement provides the following clear and unambiguous formula for calculating the adjusted annual rental rate for the Leased Land:

> . . . .
> *The rent as adjusted shall be equal to fifteen percent (15%) of the fair market value of the leased land, exclusive of the improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. . . .*
> . . . .

24. In September of 2009, PMC retained Bowman Appraisal and Valuation ("Bowman") to determine the fair market value of the Leased Land on the prior three rent adjustment dates.

25. On or about October 5, 2009, Bowman provided its appraisal report to PMC, which states that the fair market values of the leased land for each of the 2001, 2004, and 2007 rent adjustment dates was $1,297,371, $1,371,507, and $1,464,176, respectively.

26. On or about October 26, 2009, PMC notified the Defendants of PMC's intention to adjust the annual rental rate pursuant to Article 1 of this Lease Agreement.

27. As evidence in support of PMC's request for an adjustment of the annual rent rate pursuant to Article 1 of the Lease Agreement, PMC provided the Defendants at that same time with a copy of Bowman's appraisal report stating the fair market value of the Leased Land for the prior three rent adjustment periods.

28. Although PMC gave Defendants proper notice of its intent to adjust the annual rental rate pursuant to Article 1 of the Lease Agreement, Defendants have refused, and continue to refuse, to pay an adjusted annual rent for the Leased Land.

29. Defendants are in breach of the Lease Agreement

30. Based upon Bowman's valuation of the Leased Land for the 2007 rent adjustment period, Defendants should have paid a total of $658,879.20 in annual rents for the 2007 rent adjustment period. Instead, Defendants paid a total of $28,686.00 in annual rents during the 2007 rent adjustment period. As such, Defendants owe PMC a sum of not less than $630,193.20 for unpaid adjusted annual rents for the 2007 rent adjustment period.

31. Although Bowman has not yet determined the fair market value of the Leased Land for the 2010 rent adjustment period, to the best of PMC's knowledge and belief, the current fair market value of the Leased Land is not less than the fair market value of the Leased Land for the 2007 rent adjustment period. Therefore, in January of 2010, Defendants should have paid annual rent in an amount of not less than $219,626.40. Instead, Defendants paid $9,562.00 in annual rent. As such, Defendants owe PMC a sum of not less than $210,064.60 for unpaid current adjusted annual rent for the 2010 rent adjustment period.

32. Furthermore, the adjusted annual rental rate for the remaining years of the 2010 rent adjustment period should not be in an amount less than $219,626.40 per year.

33. To bring this suit, Plaintiff has retained the services of Merrill & Merrill, Chartered, and is entitled to an award of attorneys' fees and costs pursuant to Idaho Code §§ 12-120(3) and 12-123, and Rule 54 of the Idaho Rules of Civil Procedure.

WHEREFORE, the Plaintiff prays that judgment be entered in Plaintiff's favor and against the Defendants as follows:

i. That Defendants be ordered to pay back rents to the Plaintiff for the 2007 rent adjustment period in a sum of not less than $630,193.20;

ii. That Defendants be ordered to pay unpaid current annual rent for the 2010 rent adjustment period in a sum of not less than $210,064.40;

iii. That Defendants be ordered to pay an annual rental rate for the remaining years of the 2010 rent adjustment period in an amount not less than $219,626.40 per year.

iv. That Defendants be ordered to pay Plaintiff's attorneys' fees and costs associated with bringing this action; and

v. For such other and further relief this Court deems just and equitable under the circumstances of this case.

DATED this 25th day of June, 2010.

MERRILL & MERRILL, CHTD.

By _____
Dave R. Gallafent
Attorneys for Plaintiff, PMC

DAVE R. GALLAFENT
KENT L. HAWKINS*
THOMAS J. LYONS
BRENDON C. TAYLOR
KENT A. HIGGINS*
IAN C. JOHNSON
JARED A. STEADMAN
R. WILLIAM HANCOCK
*ALSO ADMITTED IN UTAH

MERRILL & MERRILL
CHARTERED
COUNSELORS AND ATTORNEYS AT LAW
109 N. ARTHUR - 5TH FLOOR
P.O. BOX 991
POCATELLO, IDAHO 83204-0991

A.L. MERRILL (1886-1961)
R.D. MERRILL (1893-1972)
W.F. MERRILL (1919-2005)

TELEPHONE:208-232-2286
FAX:208-232-2499

Founded in 1913

June 28, 2010

Winston Beard
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404

Re: PMC / Quail Ridge & Century Park

Dear Winston:

It is our understanding from you that your clients have authorized you to accept service of our Complaint in the above-referenced matter. As such, please find enclosed conformed copies of our Complaint and Summons along with an Acceptance of Service for you to complete. We ask that you please execute this Acceptance of Service and return to us in the self-addressed stamped envelope as soon as possible.

Thank you in advance for your assistance.

Sincerely,

MERRILL & MERRILL, CHTD.

Dave R. Gallafent
DRG/rwh/5975

cc: Norm Stephens

Dave R. Gallafent
R. William Hancock
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Idaho State Bar #1745,7938
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, LLC, Defendants.	Case No. CV 10-2724 OC **SUMMONS**

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF(S). THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. **READ THE INFORMATION BELOW.**

TO: QUAIL RIDGE MEDICAL INVESTORS, LLC

YOU ARE HEREBY NOTIFIED that in order to defend this lawsuit, an appropriate written response must be filed with the above-designated court within 20 days after service of this Summons on you. If you fail to so respond the court may enter a judgment against you as demanded by the Plaintiff(s) in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice of or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, **or** the signature, mailing address and telephone number of your attorney.

4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED this 25 day of June, 2010.

CLERK OF THE DISTRICT COURT

By _____
Deputy Clerk

EXHIBIT 1

COPY

GROUND LEASE AGREEMENT

Table of Contents

HORNSTEIN WYNN, FERGUSON & STOLLER
ATTORNEYS AT LAW

GROUND LEASE AGREEMENT

This Ground Lease Agreement is made and entered into this 27 day of January, 1983, by and between INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation, authorized to do business in the State of Idaho under the name of Pocatello Regional Medical Center (hereinafter called "Lessor"), and STERLING DEVELOPMENT CO., a Washington partnership authorized to do business in the State of Idaho, (hereinafter called "Lessee").

R E C I T A L S

WHEREAS, Lessor owns certain real property located within the City of Pocatello, Bannock County, Idaho; and

WHEREAS, Lessor wishes to lease to Lessee approximately 4 acres, more or less, of said property for construction of a Psychiatric Hospital building (the "hospital") and to impose certain restrictions on the use of such parcel of real property and Lessee wishes to lease said parcel of real property for such purpose, subject to Lessor's restrictions; and

WHEREAS, Lessor and Lessee wish to enter into a written ground lease agreement setting forth the terms, conditions and restrictions under which said parcel of real property is to be leased;

NOW, THEREFORE, for and in consideration of the mutual covenants, conditions and promises contained herein, Lessor and Lessee agree as follows:

ARTICLE 1
DESCRIPTION, TERM AND RENTAL

1.1 Real Property Leased. Lessor hereby leases to Lessee and Lessee hereby leases from Lessor the real property described

HORNSTEIN, WYNNE, FERGUSON & STOLNIK
ATTORNEYS AT LAW
1220 MAIN ST • SUITE 300
P.O. BOX 644
VANCOUVER, WASHINGTON
280 of 447

Thousand and No/100 Dollars ($15,000.00) per acre.

(b) Adjustments Based on Property Value. The annual net rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date.

The parties' written agreement within ninety (90) days before the applicable rent adjustment date shall be a conclusive determination between the parties of the fair market value for the period to which the adjustment applies. If the parties have not so agreed by the applicable rent adjustment date, the determination shall be made as in the paragraph on Arbitration in Article 13.

The rent as adjusted shall be equal to fifteen percent (15%) percent of the fair market value of the leased land, exclusive of the improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.

If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.

HORNSTEIN WYNNE FERGUSON & STOLNIK
ATTORNEYS AT LAW
[illegible] MAIN ST • SUITE [illegible]
230 OF [illegible]
VANCOUVER, WASHINGTON [illegible]

ARTICLE 2

USE OF LEASED LAND AND TITLE TO IMPROVEMENTS

2.1 Use of Leased Land. Lessee shall use the leased land solely for the purpose of constructing, maintaining and operating the hospital for psychiatric care and substance abuse treatment; provided that Lessee may at any time use the leased land for any lawful purpose. Lessee shall commence construction of the hospital within forty-five (45) days after the commencement date of this Lease and the issuance of a building permit. If Lessee is delayed in commencing construction or receiving the permit by any cause or causes beyond Lessee's control, such causes including but not necessarily being limited to Acts of God, strikes, war, insurrections, and the like, said forty-five (45) day period to commence construction shall be extended for a period equivalent to the time lost by reason of any such cause or causes; provided, however, that no extensions shall be granted for any such delay which commences more than ten (10) days before Lessee notifies Lessor of such delay and the reasons therefor. Once construction is begun, Lessee shall, with reasonable diligence, prosecute to completion all construction of improvements, additions, or alterations and shall have substantially completed construction of the hospital within One (1) years after date of this lease. "Substantial completion" shall mean that the hospital is ready for occupancy and use as a hospital as evidenced by a Certificate of Occupancy or other like document issued by an appropriate governmental authority. If Lessee is delayed in substantial completion of the hospital by any cause or causes beyond Lessee's control, such causes including but not necessarily being limited to Acts of God, strikes, war, insurrections, and the like, said date for substantial completion of the hospital shall be extended for a period equivalent to the time lost by reason of any such cause or causes; provided, however, that no extensions will be granted for any such delay

HORENSTEIN, WYNNE, FERGUSON & STOUSSIN
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]
[illegible]

to Lessor until the expiration of the Term or the prior termination of this lease by default of Lessee giving Lessor the right to terminate this lease pursuant to Article 10 hereof. Lessee covenants and agrees that upon expiration of the Term it will yield up and deliver the leased land with any such buildings, permanent improvements, and fixtures upon the leased land at such time free and clear of all liens and encumbrances of any kind, and upon such expiration title therein shall be in Lessor. In the event of earlier termination of this lease, Lessee covenants and agrees that it will yield up and deliver the leased land with any such buildings, permanent improvements, and fixtures upon the leased land at such time free and clear of all liens and indebtedness of any kind. Provided, however, that such obligation to deliver the leased land and improvements free and clear of all liens and indebtedness shall not apply to the original lien of first encumbrance represented by the mortgage or Deed of Trust or other security interest referred to in Article 6 hereof given to secure the financing for the construction of the original buildings, permanent improvements, and fixtures upon the leased land. Upon such earlier termination, title in the buildings, permanent improvements and fixtures upon the leased land shall be in Lessor.

2.5 Deed at Termination. Upon termination of this lease, Lessee shall, subject to the foregoing, execute a deed satisfactory in form and content to Lessor confirming Lessor's title to any buildings, permanent improvements, and fixtures therein, upon the leased land at the time of termination.

2.6 Additional Real Property. At such time as Lessee shall require additional real property for the expansion of the hospital, Lessee shall so notify Lessor and Lessor shall in good faith consider the leasing of additional real property to Lessee for such purpose.

HORENSTEIN, WINNE, FERGUSON & STOLMAR
ATTORNEYS AT LAW
1221 MAIN ST. • SUITE 300
P.O. BOX 1067
VANCOUVER, WASHINGTON 98660
232 OF 247

exceed seventy-five percent (75%) of the replacement value of all of the improvements. If the cost does exceed that percent, Lessee may nevertheless repair, restore and replace as above or may by notice elect instead to raze the improvements damaged or destroyed. Within thirty (30) days after such notice, Lessor may by notice elect to repair, restore and replace as above, and Lessee shall not raze until the expiration of the time for Lessor's notice of election. Lessor shall not be required to furnish any services or facilities or to make any repairs or alterations of any kind in or on the premises. Lessor's election to perform any obligation of Lessee under this provision on Lessee's failure or refusal to do so shall not constitute a waiver of any right or remedy for Lessee's default, and Lessee shall promptly reimburse, defend, and indemnify Lessor against all liability, loss, cost, and expense arising from it.

In determining whether Lessee has acted promptly as required under the foregoing paragraph, one of the criteria to be considered is the availability of any applicable insurance proceeds.

Nothing in this provision defining the duty of maintenance shall be construed as limiting any right given elsewhere in this lease to alter, modify, demolish, remove, or replace any improvement, or as limiting provisions relating to condemnation or to damage or destruction during the final year or years of the Term. No deprivation, impairment, or limitation on use resulting from any event or work contemplated by this paragraph shall entitle Lessee to any offset, abatement, or reduction in rent nor to any termination or extension of the Term.

3.2 Relief for Substantial Loss of Area. If any damage to or destruction of the premises or the improvements is such that 75% of the floor area is rendered unusable for purposes stated in the Lease, Lessee may, at Lessee's election, delay the work

HORENSTEIN WYNN, FERGUSON & STOCKER
ATTORNEYS AT LAW
1201 THIRD AVENUE, SUITE 900
SEATTLE, WASHINGTON 98101
(206) 621-1447

appropriate judicial or administrative proceedings, without cost or expense to Lessor, the validity or application of any law, ordinance, order, rule, regulations or requirement (hereinafter called "Law") that Lessee repair, maintain, alter or replace the improvements in whole or in part, and Lessee shall not be in default for failing to do such work until a reasonable time following final determination of Lessee's contest. If Lessor gives notice of request, Lessee shall first furnish Lessor a bond, satisfactory to Lessor in form, amount and insurer, guaranteeing compliance by Lessee with the contested law, and indemnifying Lessor against all liability that Lessor may sustain by reason of Lessee's failure or delay in complying with the Law. Lessor may, but is not required to, contest any such Law independently of Lessee. Lessor may, and on Lessee's notice of request shall, join in Lessee's contest.

3.5 Damage or Destruction During Final Years of Term. In the event of substantial damage or destruction to the hospital or any part thereof during the last five (5) years of the Term, Lessor shall have the right, exercisable during the ninety (90) days following the date of such damage or destruction, to terminate this lease. Lessor shall exercise such right by delivering to Lessee written notice of the date of such termination, which date shall not be earlier than thirty (30) days following the date of Lessor's notice of termination. Upon exercise of such right, Lessor shall be entitled to recover the full proceeds of any policy of insurance covering any such damage or destruction except such proceeds as may be attributable to Lessee's loss of personal property and/or to interruption of Lessee's business.

If Lessor does not elect to terminate this lease, Lessee shall be responsible for the repair, rebuilding or replacement of the hospital or any part thereof so damaged or destroyed as the case may be. All such repairs, rebuilding or

HORENSTEIN, WYNNE, FERGUSON & STOUAIRE
ATTORNEYS AT LAW
SUITE 300
234 OF 447

mortgagee a statement in writing, certifying, if such is the case, that this lease is then unmodified and unamended, that it is not in default, and that it is in full force and effect. If there have been modifications and amendments to this lease, said statement shall, if such is the case, certify that the same is not then in default and is in full force and effect as then modified and amended. Said modifications and amendments shall be set forth in full in said statement. Said statement shall further state the dates to which the basic rental or other charges have been paid, and whether or not there is any existing default by Lessee with respect to any covenant, promise of agreement on the part of Lessee provided to be performed under this lease, and also whether a notice of such default has been served by Lessor. If any such statement contains a claim of non-performance, insofar as actually known by Lessor, shall be summarized in said statement. Lessee shall make payment when due and before delinquency of all principal, interest and other charges for which Lessee may be or become obligated under any leasehold mortgage upon the leasehold estate.

4.2 Foreclosure of Lien. Prior to commencing any action to foreclose a leasehold mortgage, the leasehold mortgagee, or any assigns of such mortgage, shall notify Lessor in writing of the default by Lessee with a statement of the amount then due and offer to withhold any acceleration of maturity of the promissory note, payment of which is secured by the leasehold mortgage. In the event Lessor shall, within thirty (30) days of the receipt of said notice, pay to said mortgagee all amounts then in arrears on said mortgage, then upon said payment said mortgagee shall reinstate the mortgage in all respects as if no default had occurred. Lessor may, at its option, make such payments on said mortgage, and the amounts of such payments shall be considered additional rental due Lessor from Lessee under this lease. Subsequent and successive defaults by Lessee in making payments required by any

HORENSTEIN, NYHAN, FERGUSON & STOLPER
ATTORNEYS AT LAW
235 Pine Street

commences foreclosure and continues its action with due diligence, and (ii) continues payment of rent and all other charges required to be paid by Lessee which have accrued and which become due and payable during the period the foreclosure proceeding is pending;

(f) That the Lessor shall not have the right to terminate this lease solely on account of any of the events anticipated by subdivision (d) of paragraph 1 of Article 10 without the written consent of the leasehold mortgagee, provided that such mortgagee promptly commences foreclosure if it has the right to do so and thereafter continues its action with due diligence;

(g) That in the event the Lessee's interest under this lease shall be sold, assigned or otherwise transferred pursuant to the exercise of any right, power or remedy of any mortgagee or pursuant to judicial proceedings or pursuant to paragraph 1 of Article 10, and if no rent or other charges shall then be due an payable under this lease, and if such mortgagee shall have arranged to the reasonable satisfaction of the Lessor for the curing of any default susceptible of being cured, Lessor within sixty (60) days after receiving a written request therefor and upon receiving payment of its expenses, including attorneys' fees, incident thereto, will execute and deliver such instrument or instruments as may be required to confirm such sale, assignment or other transfer of Lessee's interest under the lease; or

(h) That in the event a default under any leasehold mortgage shall have occured, the mortgagee may exercise any right, power or remedy of the mortgagee under the mortgage which is not in conflict with the provisions of the lease.

HORENSTEIN, WYNNE, FERGUSON & STOUMBOS
ATTORNEYS AT LAW
1220 MAIN ST., SUITE 300
408 884-4447

whichever is the shorter. The "term" means the original term herein or exercise of the renewal options herein provided for.

6.2 Expenses. All expenses in connection with the making of said mortgage or Deed of Trust shall be borne by Lessee, and Lessor will execute any and all documents that may be required with respect thereto. However, Lessor shall assume no personal liability for the underlying indebtedness, but the mortgage note or other evidence of indebtedness shall be executed solely by the Lessee. The foregoing provisions of this Article shall extend to any construction mortgage loan applied for by Lessee, as well as any permanent mortgage loan, and any mortgages in substitution or in replacement thereof, and as often as during the term such loans are applied for by the Lessee.

6.3 Non-Mortgage by Lessor. Lessor agrees not to place any mortgage on the premises, or permit the same to be encumbered in any manner, without the prior written consent of the Lessee.

6.4 Limitation on Subordination. Lessor's agreement to subordinate any given portion of the fee title to a first mortgage is limited to one such mortgage on the given portion of the fee title for the purpose of enabling Lessee to obtain financing for the improvements as contemplated herein and located on the given portion of the leased land; provided that, for this purpose, mortgages securing separate construction and take-out or permanent loans for the same work of improvement shall be considered to be one mortgage. Both the note and the mortgage securing it shall expressly provide that there can be no extension of the due date, addition to the balance of the loan, alteration of any provision in the documents, release of any obligor, or any refinancing of the unpaid principal balance without Lessor's prior written approval. Nothing in this paragraph shall prohibit mortgagee from paying delinquent taxes or

HORENSTEIN, WYNNE, FERGUSON & STOUMEN
ATTORNEYS AT LAW
1237 0447

boilers and elevators included in any improvements located on the demised premises, insuring the Lessee against any and all claims and demands made by any person or persons whomsoever for injuries received in connection with the operation and maintenance of the premises, improvements, and buildings located on the demised premises or for any other risk insured against by such policies, each class of which policies shall have been written within limits of not less than Five Hundred Thousand and No/100 Dollars ($500,000.00) for damages incurred or claimed by any one person for bodily injury, or otherwise, plus One Hundred Thousand and No/100 Dollars ($100,000.00) damages to property, and for not less than One Million and No/100 Dollars ($1,000,000.00) for damages incurred or claimed by more than one person for bodily injury, or otherwise, plus One Hundred Thousand and No/100 Dollars ($100,000.00) damages to property. All such policies shall name the Lessee and the Lessor, as their respective interests may appear, as the persons assured by such policies; and the original or duplicate original of each of such policy or policies shall be delivered by the Lessee to the Lessor promptly upon the writing of such policies, together with adequate evidence of the fact that the premiums are paid.

7.2 Fire and Wind Damage Insurance.

(1) Lessee's Obligation. The Lessee covenants and agrees with Lessor that from and after the time when the lease commences, the Lessee will keep insured any and all buildings and improvements upon the said premises against all loss or damage by fire and windstorm, and what is generally termed in the insurance trade as "extended coverage", which said insurance will be maintained in an amount which will be sufficient to prevent any party in interest from being or becoming a co-insurer on any part of the risk, which amount shall not be less than eighty percent (80%) of the full insurable value, and all of such policies

HORNSTEIN, WYNNE, FERGUSON & STOLTZ INC
ATTORNEYS AT LAW
SUITE 300
238 of 247

property upon the demised premises prior to such damage or destruction, and shall have the same rebuilt and ready for occupancy within fifteen (15) months from the time when the loss or destruction occurred. The fifteen (15) month period for reconstruction shall be enlarged by delays caused without fault or neglect on the part of the Lessee by act of God, strikes, lockouts, or other conditions beyond the Lessee's control.

(2) Delivery of Policies. The originals of all such policies shall be delivered to the Lessor by the Lessee along with the receipted bills evidencing the fact that the premiums therefore are paid; but nothing herein contained shall be construed as prohibiting the Lessee from financing the premiums where the terms of the policies are for three (3) years or more and in such event the receipts shall evidence it to be the fact that the installment premium payment or payments are paid at or before their respective maturities. Where, however, there is a mortgage on the premises created pursuant to the provisions contained in this lease and if, under the terms of such mortgage, it is obligatory upon the Lessee to cause the originals of the policies to be delivered to the mortgagee, then the Lessee shall deliver to the Lessor duplicate certificates of such policies. The policies or duplicate certificates thereof, as the case may be, shall be delivered by the Lessee to the Lessor at least ten (10) days prior to the effective date of the policies.

(3) Effect of Mortgage Subordination. All of the provisions herein contained relative to the disposition of payments from insurance companies are subject to the fact that if any mortgagees holding a mortgage created pursuant to the provisions of this lease hereof elects, in accordance with the terms of such mortgage, to require that the proceeds of

HORNSTEIN, WYNNE, FERGUSON & STOLMEIER
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 900
239 of 447

(5) Direct Repayment. The foregoing notwithstanding, in the event the insurance proceeds are the sum of Twenty Five Thousand and No/100 Dollars ($25,000.00) or less, then such proceeds shall be paid directly to the Lessee without the necessity of creating the joint bank account as hereinabove set forth, and Lessee shall use such funds to make the replacements or repairs as required hereunder.

7.3 Lessee's Covenant to Pay Insurance Premiums. The Lessee covenants and agrees with Lessor that the Lessee will pay premiums for all of the insurance policies which the Lessee is obligated to carry under the terms of this lease, and will deliver to the Lessor evidence of such payments before the payment of any such premiums become in default, and the Lessee will cause renewals of expiring policies to be written and the policies or copies thereof, as the lease may require, to be delivered to Lessor at least ten (10) days before the expiration date of such expiring policies.

7.4 Indemnification.

(a) Defense and Payment of Claims. Lessee agrees to defend, indemnify and hold Lessor harmless together with all of its servants, agents, or employees, from and against all liability or loss for injuries to or deaths of persons or damages to property caused by Lessee's acts or omissions to act, use of, or occupancy of the leased land, or as the result of Lessee's operations on said leased land. Each party hereto shall give to the other parties prompt and timely notice of any claim or suit instituted coming to its knowledge which in any way, directly or indirectly, contingently or otherwise, affects or might affect another party, and all parties shall have the right to participate in the defense of the same to the extent of each parties' own interest.

HORENSTEIN WYNNE FERGUSON & STOLNIKE
ATTORNEYS AT LAW
240 [illegible]

7.5 Insurer Qualified. The insurer shall be qualified and authorized through the Department of Insurance of the State of Idaho.

ARTICLE 8

TAXES, ASSESSMENTS, LIENS AND ENCUMBRANCES

Lessee shall be responsible to pay and discharge all existing and future taxes and assessments which are or may become a lien upon or which may be levied by the State, County or any other tax levying body upon the leased land or improvements thereon or property located on the leased land. Lessee shall also be responsible for all insurance premiums, and for all liabilities, charges, fees, obligations, liens and encumbrances associated with or relating to the existence and use of the leased land including, but not limited to, all assessment installments due or payable after the date of this lease. All payments of taxes or assessments or both, except permitted installment payments, shall be prorated for the initial lease year and for the year in which the lease terminates. Lessee may, in its own name, or to the extent necessary under Lessor's name, contest in good faith by all appropriate proceedings, the amount, applicability or validity of any tax, assessment or fine pertaining to the leased land, or to any building, structure or improvement upon the leased land, and in the event Lessee does in good faith contest the applicability or validity of any tax, assessment or fine, Lessor will cooperate in such contest whenever possible with Lessee; provided that such contest will not subject any part of the leased land to forfeiture or loss, except that, if at any time payment of the whole or any part of such tax, assessment or fine shall become necessary in order to prevent any such forfeiture or loss, Lessee shall pay the same or cause the same to be paid in time to prevent such forfeiture or loss.

HORNSTEIN, WYNNE, FERGUSON & STOUMBOS
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 100
VANCOUVER, WASHINGTON
24 of 47

(3) For the purpose of computing the last five years of the term within the meaning of subparagraphs (1) and (2) above, it is agreed that said "last five years" shall mean the last five years of the original term, or if, at or prior to the date that the award or the first partial payment thereof (if there be such partial payments) becomes payable, the parties shall have duly agreed to extend the term of this lease pursuant to the options to renew herein contained or by a written instrument executed in the manner required for recording, then said last five years shall be deemed to mean the last five (5) years of the term as so extended.

(c) If the values of the respective interests of Lessor and Lessee shall be determined according to the provisions of subdivisions (a) and (b) of this Section in the proceeding pursuant to which the demised premises shall have been taken or condemned, the values so determined shall be conclusive upon Lessor and Lessee. If such values shall not have been thus separately determined, such values shall be fixed by agreement between the Lessor and Lessee or if they are unable to agree, then the controversy shall be resolved by arbitration under the procedure to govern in Arbitration as set forth in this lease hereof under Article 13.

(d) In the event of the taking in condemnation of less than the whole of the demised premises but materially all of said premises as hereinbelow defined and the part of the premises that remains includes a part of the improvement that was taken, then as to the untaken remainder of the improvement only, but not any remaining land, the parties shall endeavor to agree on the then fair market value of such remainder of the improvement, and if they fail to agree then the controversy shall be resolved by arbitration. The value so agreed upon as the then fair market value of such

HORENSTEIN, WYNNE, FERGUSON & STOUMEN
ATTORNEYS AT LAW
242 [illegible]

(i) Appointment of Receiver. Apply for or consent in writing, signed on behalf of Lessee or its duly authorized attorney, to the appointment of a receiver, trustee or liquidator of the Lessee or of all or a substantial part of Lessee's assets; or

(ii) Voluntary Bankruptcy. File a voluntary petition in bankruptcy or admit in writing its inability to pay its debts as they become due; or

(iii) Assignment for Creditors. Make a general assignment for the benefit of creditors; or

(iv) Reorganization or Arrangement. File a reorganization or arrangement with creditors to take advantage of any insolvency law; or

(v) Admit Insolvency. File an answer admitting the material allegations of a petition filed against Lessee in any bankruptcy, reorganization or insolvency proceeding, or during the Term of this lease, an order, judgment or decree shall be entered by any court of competent jurisdiction, on the application of a creditor, adjudicating Lessee bankrupt or insolvent or approving a petition seeking a reorganization of Lessee or appointing a receiver, trustee or liquidator of Lessee, or of all or a substantial part of its assets.

10.2 Remedies. In the event of any breach or default of this lease by Lessee, then Lessor, besides other rights of re-entry may continue professional services to the patients of the hospital and use of the property upon the premises for these purposes.

HORENSTEIN, WYNNE, FERGUSON & STOUMBO
ATTORNEYS AT LAW
120 MAIN ST. SUITE 300
PO BOX 44

excess, if any, of the amount of rent, additional rent and charges equivalent to rent reserved in this lease for the remainder of the Term over the then reasonable rental value of the premises for the remainder of the Term. The remedies herein given to Lessor shall be cumulative, and the exercise of any one remedy by Lessor shall not be to the exclusion of any other remedy. With previous written notice or demand, separate actions may be maintained by Lessor against Lessee from time to time to recover any rent or damages which, at the commencement of any such action, has become due and payable to Lessor without waiting until the end of the Term of this lease.

10.3 Attorney's Fees. In the event suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant herein contained to be kept or performed, the prevailing party shall be paid a reasonable attorney's fee by the other party, and such attorney's fee shall be deemed to have accrued at the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.

ACTICLE 11
COVENANTS AND WARRANTIES

Except as otherwise expressly provided in this lease, lessee agrees to take possession of the leased land in an "as is" condition, provided however, that Lessor covenants, represents and warrants as follows:

11.1 Title. That Lessor has good and marketable title to the leased land and said title is free and unencumbered. Lessor's right, title and interest in and to the leased land, except for this lease and for any lien or indebtedness incurred pursuant to Article 4, shall not be subordinated to any other claim or interest of Lessee or to any other claim or interest of

ally liable for the performance of all obligations and covenants of Lessee's assignee(s) or subtenant(s) under this Lease. In the event Lessee shall determine to sell all or any portion of the hospital, and/or any additions or expansions thereto or thereof, Lessor shall be ~~xxxxxxx~~ granted first right of refusal to purchase the hospital as the fair market value which, unless agreed upon by the parties, shall be determined by an M.A.I. real estate appraiser appointed and paid by Lessor. If Lessee is not satisfied with the fair market value appraisal submitted by the appraiser selected by Lessor, Lessee may, at its own expense and within twenty (20) days of the receipt of the appraisal, select an M.A.I. real estate appraiser who, together with the appraiser selected by Lessor, shall choose a third such appraiser whose fees shall be shared equally by Lessor and Lessee. If Lessee fails to select a second appraiser within the time allowed, the single appraiser appointed shall be the sole appraiser and shall set the fair market value of the hospital. If Lessee does timely act, and a majority cannot agree as to the fair market value of the hospital, the three (3) appraisals shall be added together and their total divided by three (3). The resulting quotient shall be the fair market value of the hospital for the purpose of this purchase option.

ARTICLE 13

ARBITRATION; APPOINTMENT

13.1 Arbitration. Either party may require the arbitration of any matter arising under or in connection with this lease. Arbitration is initiated and required by giving notice specifying the matter to be arbitrated. If action is already pending on any matter concerning which the notice is given, the notice is ineffective unless given before the expiration of thirty (30) days after service of process on the person giving the notice.

Except as provided to the contrary in these provisions on arbitration, the arbitration shall be in conformity and subject

HORENSTEIN, WYNNE, FERGUSON & STOUMBO
ATTORNEYS AT LAW
1230 PAUL SUITE 300
245-0447

ARTICLE 14

MISCELLANEOUS PROVISIONS

14.1 Exercise of Renewal Option. Lessee may exercise its option to extend the Term granted under Article I, paragraph 1.2, hereof, by giving Lessor written notice thereof not later than 120 days prior to the expiration date of the Term. Any option so exercised shall extend the lease on the same terms as are in effect at the time of the exercise of such options, subject to adjustment and notification in accordance herewith.

14.2 Inspection by Lessor. Lessor may enter upon the leased land at any reasonable time for any purpose necessary, incidental to or connected with verifications of the performance of Lessee's obligations hereunder, but subject to any provisions with respect thereto otherwise contained herein.

14.3 Negation of Partnership. Nothing in this lease shall be construed to render the Lessor in any way or for any purpose a partner, joint venturer, or associate in any relationship with Lessee other than that of landlord and tenant, nor shall this lease be construed to authorize either to act as agent for the other except as expressly provided to the contrary in this lease.

14.4 Controlling Law. This lease shall be deemed to be made and shall be construed in accordance with the laws of the State of Idaho.

14.5 Surrender of Possession. Lessee agrees to yield and deliver to Lessor possession of the demised land at the termination of this lease or as otherwise provided herein, in good condition and in accordance with the express obligations provided herein, except for reasonable wear and tear, and Lessee shall execute and deliver to Lessor a good and sufficient document of relinquishment, if and when requested.

14.6 Successors. This lease shall bind and inure to the benefit of any successor or assignee of Lessor and any successors or assignees of Lessee whether resulting from any merger,

HORNSTEIN, WYNNE, FERGUSON & STOLNIKOW
ATTORNEYS AT LAW
2400 441
VANCOUVER, WASHINGTON

14.9 Amendment of Lease. Lessor and Lessee shall cooperate and include in this lease by suitable amendment from time to time any provision that may reasonably be requested by any proposed Leasehold Mortgagee for the purpose of implementing the Mortgagee protection provisions contained in this lease and allowing such mortgagee reasonable means to protect or preserve the lien of a Leasehold Mortgage on the occurrence of a default on the terms of this lease. Lessor and Lessee each agree to execute and deliver and to acknowledge if necessary for recording purposes, any agreement necessary to effect such amendment; provided, however, such amendment shall not in any way affect the term or rent under this lease nor otherwise in any respect adversely affect the rights of the Lessor in this lease.

14.10 Recording. Lessor and Lessee agree to execute and have acknowledged, and Lessee agrees to deliver to Lessor, a memorandum of this lease in the form attached hereto as Exhibit "B" for the purpose of recording such memorandum with the County Recorder of Bannock County.

IN WITNESS WHEREOF, the parties have set their hands the day and year first above written.

LESSOR:

INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation authorized to do business in Idaho, dba Pocatello Regional Medical Center

By S/ Chris J. Clinton
Administrator

By _____

ATTEST:
Witness
S/ Donald W Olson

HORENSTEIN, WYNNE, FERGUSON & STOUKINE
ATTORNEYS AT LAW
247 of 467

STATE OF IDAHO)
: ss.
County of Bannock)

On this 27th day of January, 19 83, before me, the undersigned, a Notary Public in and for said State, personally appeared M. L. CANCELOSI and JOHN R. YUDITSKY, known to me to be the General Partners of STERLING DEVELOPMENT CO., a Washington partnership, the partnership that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC in and for the State of Idaho, residing at Pocatello

HORENSTEIN, WYNN, FERGUSON & STOLL

EXHIBIT 2

EXHIBIT A
LEGAL DESCRIPTION

A parcel of land in the State of Idaho, County of Bannock, located in the NE ¼ of Sec. 25 T. 65., R. 34 E., B.M., more particularly described as follows:

Beginning at the NE ¼ of Sec. 25. Thence South 0 degrees 01' 58" East along the East line of Sec. 25, 1461.67 feet, thence West 509.89 to the True Point of Beginning. Said point on the Westerly right-of-way of the hospital.

Thence, South 0 degrees 01'50" along Westerly right-of-way 160.64 feet to the Point of curvature of a 488.37 foot radius curve having a central angle of 33 degrees 43'35"

Thence, Southeasterly along said curve to the left 287.47 feet

Thence, South 88 degrees 42'58" West 488.91 feet

Thence, North 442.14 feet

Thence East 406.35 feet to the True Point of Beginning.

Contains 4.25 acres

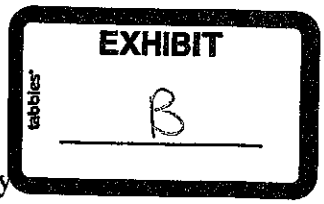
Michael D. Gaffney, ISB No. 3558
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com

Attorney for Defendants

DISTRICT COURT SIXTH JUDICIAL DISTRICT BANNOCK COUNTY IDAHO

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTERS, LLC, Plaintiff, QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, LLC, Defendants.	Case No.: CV-10-2724 OC ANSWER AND JURY DEMAND

The defendants, Quail Ridge Medical Investors, LLC and Century Park Associates, LLC (Quail Ridge, collectively), through counsel of record, Beard St. Clair Gaffney PA, respectfully answer the plaintiffs' complaint as follows:



1. Admit paragraph 1, 2, 3, 6 and 7.
2. The answering defendants have insufficient information to admit or deny paragraphs 4 and 5. It is admitted that PMC has attached a Lease Agreement to the Verified Complaint; however, the answering defendant cannot authenticate or otherwise admit the specifics of the Lease Agreement. The answering defendant does admit that a Lease Agreement was entered into a lease dated January 27,

1983 between Intermountain Healthcare, Inc. (IHC) and Sterling Development Co.

3. Deny paragraphs 8 through 33, inclusive.

AFFIRMATIVE DEFENSES

1. The plaintiff fails to state a claim upon which relief can be granted.

2. The plaintiff's claims are barred by its unclean hands.

3. The plaintiff's claims are barred by the doctrine of res judicata.

4. The plaintiff's claims are barred by the doctrine of estoppel.

5. The plaintiff's claims are barred from recovery by the doctrine of laches.

6. The plaintiff has failed to mitigate its alleged damages, if any.

7. The plaintiff's claims, some or all of them, are barred by the applicable statute of limitations

8. The plaintiff's claims are barred by the doctrine of collateral estoppel.

9. The plaintiff's claims are barred on the basis that they lack a legal basis.

10. The plaintiff's claims are barred because they are not based in fact.

11. The plaintiff has failed to join necessary or indispensible parties.

12. The defendants are excused from performance by virtue of breach of the lease agreement on the part of the plaintiff.

13. The plaintiff has waived, through its conduct or course of dealing, any retroactive or prospective claims for rent adjustments.

14. The plaintiff is not the real party in interest.

15. The plaintiff has failed to give required contractual or statutory notices to the defendants for alleged rents due.

16. The plaintiff has failed to perform a condition precedent to enforcement or imposition of any rental adjustment, including, but not limited to, compliance with section 1.3(b).

17. Any determination of fair market value must exclude consideration of improvements and the lease. Improvements include roads, utilities, buildings and improvements to surrounding lands that affect the value of the land in question.

18. Any determination of fair market value must include consideration that the initial value was an agreed $15,000 per acre, and all determinations of value were made, accepted, agreed to, or relied upon by the parties at each adjustment date since the inception of the lease. Thus, adjustments, if any, are limited to changes in value during the period since last acceptance or acquiescence of fair value by the parties.

PRAYER FOR RELIEF

WHEREFORE, the defendants pray for the following relief from this Court:

1. Dismissal of the plaintiff's Complaint in its entirety;
2. Awarding the defendants their full, reasonable attorney fees and costs pursuant to Idaho Code § 12-120 and 12-121 and Rule 54 of the Idaho Rules of Civil Procedure;
3. Granting such other relief as the court deems just and proper.

JURY DEMAND

The defendants/counterclaimants demand a jury as to all triable issues.

Dated: August 2, 2010

Michael D. Gaffney
Beard St. Clair Gaffney PA
Attorney for Defendants

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on August 2, 2010, I served a true and correct copy of the ANSWER AND JURY DEMAND on the following by the method of delivery designated below:

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204-0991
Fax: 232-2499

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Bannock County Courthouse
624 E Center, Rm 220
Pocatello, ID 83201
Fax: 236-7012

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Michael D. Gaffney
Beard St. Clair Gaffney PA
Attorney for Defendants

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

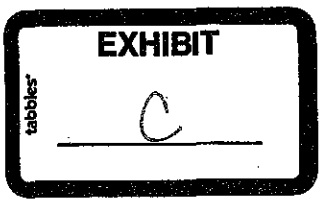
IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,	
Plaintiff,	Case No. CV-10-2724
vs.	AMENDED COMPLAINT
QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES, LLC,	
Defendants.	

COMES NOW the Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC, by and through its attorneys, Merrill and Merrill, Chartered, and for its action against the Defendants, Quail Ridge Medical Investors, LLC, and Century Park Associates, LLC, complains and alleges as follows:

1. Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC"), is a Delaware limited liability company authorized to do business in the State of Idaho, whose principal place of business in the State of Idaho is 651 Memorial Drive, Pocatello, Bannock County, Idaho 83201.



2. Defendant, Quail Ridge Medical Investors, LLC ("Quail Ridge"), is a Tennessee limited liability company authorized to do business in the State of Idaho, whose principal place of business is 3570 Keith Street NW, Cleveland, Tennessee 37312.

3. Defendant, Century Park Associates, LLC ("Century Park"), is a Tennessee limited liability company authorized to do business in the State of Idaho, whose principal place of business is 3570 Keith Street NW, Cleveland, Tennessee 37312.

4. This lawsuit arises from a certain *Ground Lease Agreement* dated January 27, 1983 ("Lease Agreement"). PMC's copy of this Lease Agreement is attached to Plaintiff's original Complaint as Exhibit "1" and is incorporated herein by this reference.

5. The Lease Agreement was originally entered into between Intermountain Health Care, Inc. ("IHC"), as original lessor, and Sterling Development Co. ("Sterling"), as original lessee.

6. The Lease Agreement concerns real property located within the City of Pocatello, Bannock County, Idaho ("Leased Land"). A true and correct copy of the legal description for the Leased Land is attached to Plaintiff's Original Complaint as Exhibit "2" and is incorporated herein by this reference.

7. On or about January 1, 1996, Sterling subleased its interest in the Leased Land to Pocatello Medical Investors Limited Partnership ("PMI"), a Tennessee limited partnership authorized to do business in the State of Idaho, whose principal place of business is 3570 Keith Street NW, Cleveland, Tennessee 37312.

8. On or about January 3, 2001, Sterling and PMI assigned their respective interests in the Leased Land and Lease Agreement to Quail Ridge and Quail Ridge thereby became the successor lessee to the Lease Agreement

9. On or about September 23, 2002, IHC assigned its interest in the Lease Agreement to IHC Health Services, Inc. and IHC Health Services, Inc., thereby became the successor lessor to the Lease Agreement.

10. On or about October 1, 2002, IHC Health Services, Inc., assigned its interest in the Lease Agreement to Bannock Regional Medical Center ("BRMC") and BRMC thereby became the successor lessor to the Lease Agreement. Shortly thereafter, BRMC changed its

name to Portneuf Medical Center.

11. On or about February 1, 2009, BRMC (then known as Portneuf Medical Center), assigned its interest in the Lease Agreement to PMC, whereby PMC became the successor lessor to the Lease Agreement.

12. To the best of PMC's knowledge and belief, Century Park is an affiliate of, or related to, Quail Ridge and may claim a Lessee's interest in the Lease Agreement.

13. Quail Ridge or Century Park or both operate a senior living facility by the name of "Quail Ridge" which facility is situated on the Lease Land.

COUNT I
BREACH OF CONTRACT

14. PMC realleges and incorporates the allegations in Paragraph 1 through 13 above as if they had been set forth fully herein.

15. When this Lease Agreement was first entered into on January 27, 1983, IHC and Sterling, as original lessor and lessee respectively, agreed upon a basis for calculating the initial annual rental. Specifically, in Article 1, Section 1.3(a) of the Lease Agreement, the original lessor and lessee agreed as follows as the basis for calculating the initial annual rental:

> . . . .
> *An initial annual rental shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre.*

16. The Leased Land is 4.25 acres and, therefore, based upon the above clear and unambiguous language, the original lessor and lessee set the initial annual rental for this Leased Land as $9,562.50 ($15,000 x 4.25 = $63,750; $63,750 x 15% = $9,562.50).

17. The annual rental rate is subject to adjustment on a periodic basis pursuant to the Lease Agreement, Article 1, Section 1.3(b), which states in relevant part:

> . . . *The annual rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date.*
> . . . .

18. The above language in Article 1 of the Lease Agreement concerning when each

rent adjustment date is to occur is clear and unambiguous. Thus, the first rent adjustment date under this Lease Agreement was scheduled for January 27, 1986 and the rent was, and is, subject to adjustment every three years thereafter until the termination of this Lease Agreement.

19. Pursuant to the foregoing schedule, the most recent rent adjustment date was January 27, 2010.

20. Although the Lease Agreement provides for period rent adjustment dates as outlined above, this Lease Agreement also clearly and unambiguously allows for retroactive adjustment of the annual rental rate when such adjustment did not occur on or before the specified rent adjustment date.

21. Specifically, Article 1, Section 1.3(b) states in relevant part:

> . . . .
> *If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.*

22. To the best of PMC's knowledge and belief, prior to PMC becoming a successor lessor to the Lease Agreement, neither IHC, IHC Health Services, Inc., nor BRMC exercised its right as lessor under this Lease Agreement to adjust the annual rental rate pursuant to Article 1 of the Lease Agreement.

23. Sometime in the summer of 2009, PMC became aware of the fact that the annual rental rate for the Leased Land had not been previously adjusted as outlined in Article 1 of the Lease Agreement.

24. Specifically, Article 1, Section 1.3(b) of the Lease Agreement provides the following clear and unambiguous formula for calculating the adjusted annual rental rate for the Leased Land:

> . . . .
> *The rent as adjusted shall be equal to fifteen percent (15%) of the fair market value of the leased land, exclusive of the improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. . . .*

25. In September of 2009, PMC retained Bowman Appraisal and Valuation ("Bowman") to determine the fair market value of the Leased Land on the prior three rent adjustment dates.

26. On or about October 5, 2009, Bowman provided its appraisal report to PMC, which states that the fair market values of the leased land for each of the 2001, 2004, and 2007 rent adjustment dates was $1,297,371, $1,371,507, and $1,464,176, respectively.

27. On or about October 26, 2009, PMC notified the Defendants of PMC's intention to adjust the annual rental rate pursuant to Article 1 of this Lease Agreement.

28. As evidence in support of PMC's request for an adjustment of the annual rent rate pursuant to Article 1 of the Lease Agreement, PMC provided the Defendants at that same time with a copy of Bowman's appraisal report stating the fair market value of the Leased Land for the prior three rent adjustment periods.

29. Although PMC gave Defendants proper notice of its intent to adjust the annual rental rate pursuant to Article 1 of the Lease Agreement, Defendants have refused, and continue to refuse, to pay an adjusted annual rent for the Leased Land.

30. Defendants are in breach of the Lease Agreement

31. After this litigation had commenced, PMC retained Integra Realty Resources ("Integra") to determine the fair market value of the Leased Land for the January 23, 2007 rent adjustment period and the January 23, 2010 rent adjustment period.

32. On or about December 15, 2010, Integra provided its appraisal report, which states that the fair market value of the leased land for the January 23, 2007 rent adjustment period is $1,080,000.00 and that the fair market value of the leased land for the January 23, 2010 rent adjustment period is $990,000.00.

33. Based upon Integra's valuation of the Leased Land for the 2007 rent adjustment period, Defendants should have paid a total of $486,000.00 in annual rents for the 2007 rent adjustment period. Instead, Defendants paid a total of $28,687.50 in annual rents during the 2007 rent adjustment period. As such, Defendants owe PMC a sum of not less than $457,312.50 for unpaid adjusted annual rents for the 2007 rent adjustment period. The 2007 rent adjustment

period includes the years 2007, 2008, and 2009.

34. Based upon Integra's valuation of the Leased Land for the 2010 rent adjustment period, Defendants should have paid a total of $445,500.00 in annual rents for the 2010 rent adjustment period. Instead, Defendants paid a total of $28,687.50 in annual rents during the 2010 rent adjustment period. As such, Defendants owe PMC a sum of not less than $416,812.50 for unpaid adjusted rents for the 2010 rent adjustment period. The 2010 rent adjustment period includes the years 2010, 2011, and 2012.

COUNT II
IN THE ALTERNATIVE, DECLARATORY JUDGMENT

35. PMC realleges and incorporates the allegations in Paragraph 1 through 34 above as if they had been set forth fully herein.

36. Defendants deny that they are obligated to pay additional rent for the 2007 and 2010 rent adjustment periods; claiming that Plaintiff failed to apply the following language from Section 1.3(b) of the Lease Agreement when Plaintiff calculated its proposed rent adjustments:

> . . . .
> *The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00_per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.*
> . . . .

37. The court has found that the above-identified language in Section 1.3(b) of the Lease Agreement does create an ambiguity in the formula to adjust the rent and, therefore, a dispute has arose between the parties over the interpretation and construction of the rent adjustment language contained in Section 1.3(b) of the Lease Agreement.

38. Section 1.3(b) of the Lease Agreement provides that if a dispute arises between the parties as to the determination of fair market value of the Leased Land for the period to which any rent adjustment applies, then "the determination shall be made as in the paragraph on Arbitration in Article 13."

39. Although multiple attempts have been made, the parties to this action have been unable to reach an agreement for determining the fair market value of the Leased Land for the

2007 and 2010 rent adjustment periods.

40. Instead of arbitrating this controversy over the determination of fair market value under Section 1.3(b) of the Lease Agreement, the parties have instead proceeded with this civil action in the District Court for Bannock County, Idaho.

41. An interpretation of the rent adjustment language in Section 1.3(b) of the Lease Agreement is necessary to deciding the relative rights and obligations of the parties to this action under this 1983 Ground Lease Agreement.

42. Until a determination of fair market value under Section 1.3(b) of the Lease Agreement is made, it is impossible for the parties to calculate an adjusted rental rate for the 2007 and 2010 rent adjustment periods.

43. Pursuant to Idaho Code Title 10, Chapter 12, this Court is authorized and has power to enter a declaratory judgment on the construction of this written contract.

44. An actual controversy exists between the parties to this action over the interpretation of the rent adjustment language in Section 1.3(b) of the Lease Agreement.

45. Entry of a declaratory judgment by the Court on how fair market value is to be determined under Section 1.3(b) of Lease Agreement is consistent with the original contracting parties' agreement that such disputes over a determination of fair market value would be arbitrated.

46. Once this Court has adjudged and declared how fair market value is to be determined under Section 1.3(b) of the Lease Agreement, this Court should further enter a judgment declaring the fair market value of the Leased Land for the 2007 and 2010 rent adjustment periods and the appropriate adjusted rent for each such period based upon the Court's fair market value determinations.

47. Finally, the last paragraph of Section 1.3(b) of the Lease Agreement requires the Defendants to "promptly after the determination [of adjusted rent], pay any difference for the period affected by the adjustment."

48. PMC has not been paid an appropriate adjusted rent for the 2007 and 2010 rent adjustment periods and, as such, the Defendants are obligated under Section 1.3(b) of the 1983 Ground Lease Agreement to promptly pay PMC any difference between the actual rent owed and

the actual rental paid for the 2007 and 2010 rent adjustment periods after this Court has determined the adjusted rent for these periods.

ATTORNEYS FEES

49. To bring this suit, Plaintiff has retained the services of Merrill & Merrill, Chartered, and is entitled to an award of attorneys' fees and costs pursuant to Idaho Code §§ 12-120(3) and 12-123, and Rule 54 of the Idaho Rules of Civil Procedure.

WHEREFORE, the Plaintiff prays that judgment be entered in Plaintiff's favor and against the Defendants as follows:

i. That Defendants be ordered to pay back rents to the Plaintiff for the 2007 rent adjustment period in a sum of not less than $457,312.50;

ii. That Defendants be ordered to pay unpaid current annual rent for the 2010 rent adjustment period in a sum of not less than $416,812.50;

iii. In the alternative, that the Court enter a declaratory judgment on the fair market value of the leased for the 2007 and 2010 rent adjustment periods;

iv. That after the fair market value of the leased land for the 2007 and 2010 rent adjustment periods has been determined by the court, that the Court adjust the rent for each such period and enter an order directing Defendants to promptly pay any difference in the actual rent owed and the actual rent paid for the 2007 and 2010 rent adjustment periods.

v. That Defendants be ordered to pay Plaintiff's attorneys' fees and costs associated with bringing this action; and

vi. For such other and further relief this Court deems just and equitable under the circumstances of this case.

DATED this 4th day of May, 2012.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock, Jr.
Attorneys for Plaintiff, PMC

CERTIFICATE OF SERVICE

I, ~~R. William Hancock, Jr.~~ Diane Gallegos, the undersigned, one of the attorneys for the Plaintiff, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 4th day of May, 2012, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile 529-9732

Judge Mitchell Brown
P.O. Box 4165
Soda Springs, ID 83276
(Chambers Copy)

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[X] Telefax 547-2147

R. William Hancock, Jr.

BANNOCK COUNTY CLERK
2012 MAY 17 AM 9:06
BY DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC PLAINTIFF, VS QUAIL RIDGE MEDICAL INVESTORS, LLC CENTURY PARK ASSOCIATES, LLC DEFENDANT	Case No: CV-2010-0002724-OC **MINUTE ENTRY AND ORDER**

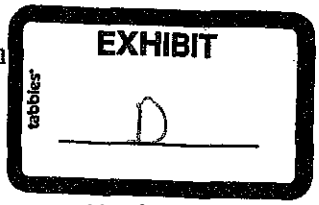
The above entitled matter came before the Court on the 14th day of May, 2012 for Court Trial. Plaintiff appeared by and through counsel, Kent L. Hawkins, and R. William Hancock. Defendants appeared by and through counsel, Michael D. Gaffney and John M. Avondet. Rodney M. Felshaw was the Court Reporter.

At the outset, counsel for the Plaintiff placed a stipulation on the record as to several of Plaintiff's exhibits. Pursuant to the stipulation, Plaintiff's Exhibits #101, 102, 103, 104, 105, 106, 108, and 115 were admitted by the Court. Exhibit #107 is withdrawn at this time.

Plaintiff's counsel, Kent L. Hawkins gave an opening statement, followed by Defendants' counsel, Michael D. Gaffney.

Plaintiff called Don Wadle who was administered an oath and testified. Mr. Hawkins conducted direct examination of the witness. Mr. Gaffney cross examined the witness.

Plaintiff called Brad Janoesh who was administered an oath and testified. Mr. Hancock conducted direct examination. The Court took its morning recess at 10:50 a.m. Upon



reconvening at 11:10 a.m., Mr. Gaffney conducted cross examination of the witness. Brief re-direct examination was conducted and the witness was excused. Plaintiff advised that it had no further witnesses for today and the Court adjourned at 11:40 a.m. for the day.

Trial reconvened at 9:00 a.m. on Tuesday, May 15, 2012. At the outset, counsel for the Plaintiff informed the Court they were resting their case. Mr. Gaffney then made a number of oral motions to the Court. A Motion for Directed Verdict as to the breach of contract claim of the Complaint was made and stipulated to by Plaintiff's counsel. The Court GRANTED the Motion for Directed Verdict as it related to Count I of the Complaint. Mr. Gaffney moved to dismiss Defendant Century Park Associates, LLC from this litigation. Again, Plaintiff stipulated to this motion and the Court GRANTED the Motion to Dismiss Century Park Associates, LLC from this litigation.

The Court heard further argument from counsel as to Defendants Motion to Strike the Testimony of Mr. Janoesh and Motion for Directed Verdict as to the declaratory relief claim of the Amended Complaint paragraphs 46, 47, and 48. Additionally, Mr. Gaffney made an oral Motion to Dismiss Count II of the Amended Complaint for lack of subject matter jurisdiction. The Court recessed to give counsel time to confer with clients before offering additional argument to the Court.

Upon reconvening, the Court ruled on the pending Motions as follows: Defendant's Motion to Strike Testimony of Mr. Janoesh is DENIED. Defendant's Motion for Directed Verdict as to paragraphs 46, 47, and 48 of the Amended Complaint is DENIED. Defendant's Motion to Dismiss Count II of the Amended Complaint is DENIED. The Court stated on the record the basis for denying each of these motions. .

Defendant's counsel then called its first witness, Earl Christison whose deposition was published and accepted by the Court. Mr. Gaffney then called Richard Faulkner, who was administered an oath and testified. Direct examination was conducted by Mr. Gaffney. Defendant's Exhibits #256, #257, and #211 were offered and admitted without objection. Exhibit #228 (pages 1-8) were offered, objected to and admitted over objection. Plaintiff's Exhibits #218 through #224 were offered, objected to and not admitted by the Court. Exhibit #227 was also offered, objected to and not admitted by the Court. Plaintiff Exhibit #242 was offered, objected to and admitted over objection. The Court took an afternoon recess at 1:05 p.m.

Court reconvened at 1:30 p.m. Plaintiff counsel had no cross examination of Mr. Faulkner and the witness was excused. Defendant's counsel then called Brent Thompson who was administered an oath and testified. At the outset, Plaintiff's counsel renewed their Motion in Limine as to this Mr. Thompson's testimony and the Court again DENIED the motion. Direct exam was conducted by Mr. Avondet. No cross examination was conducted and the witness was excused. Defendants then rested their case.

The Court took a brief recess waiting on the arrival of Plaintiff's rebuttal witness. The Court reconvened with Plaintiff rebuttal witness Tracy Farnsworth who was administered an oath and testified. Direct examination of the witness was handled by Mr. Hawkins. Cross examination was conducted by Mr. Gaffney. The witness was excused and evidence was closed.

The Court and counsel then discussed preparation of the trial transcript in this matter and submission of proposed Findings of Fact and Conclusions of Law. Counsel would like the transcript prepared prior to the submission and agreed the costs associated with the preparation of the transcript shall be shared by the parties. Upon receipt of the transcript, the Plaintiff shall have 14 days to submit proposed Findings of Fact and Conclusions of Law to the Court with a

separate document containing closing arguments. Defendant will then have 14 days to submit the same. Counsel for Plaintiff shall then have 7 days for any reply argument (but no additional findings of fact or conclusions of law) they may wish to submit. At that time the matter will be taken under advisement by the Court.

IT IS SO ORDERED.

DATED: May 15, 2012.

Mitchell W. Brown

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that on the 17 day of May, 2012, she caused a true and correct copy of the foregoing Minute Entry and Order to be served upon the following persons in the following manner:

PLAINTIFF ATTORNEY:
Kent L. Hawkins
P.O. Box 991
Pocatello, Idaho 83204-0991

- ☐ Faxed
- ☐ Hand Delivered
- ■ Mailed

DEFENDANT ATTORNEY:
Michael D. Gaffney
2105 Coronado State
Idaho Falls, Idaho 83404

- ☐ Faxed
- ☐ Hand Delivered
- ■ Mailed

DALE HATCH, Clerk

Brandy Peck, Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

BANNOCK COUNTY, STATE OF IDAHO

POCATELLO HOSPITAL, LLC, d/b/a PORTNEUF MEDICAL CENTER, LLC,	)	
Plaintiff,	)	
vs.	)	Case No. CV-2010-2724
QUAIL RIDGE MEDICAL INVESTORS, LLC, and CENTURY PARK ASSOCIATES, LLC,	)	
Defendants.	)	

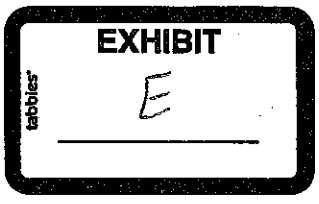
May 15, 2012 - Volume 2 of 2 of a Bench Trial.

The Honorable Mitchell W. Brown presiding.

REPORTED BY:

RODNEY FELSHAW, C.S.R. No. SRL-299

Notary Public



finder. He doesn't get you any closer to how to incorporate those additional criteria that are in the lease. I mean, he didn't even talk about it. Basically what they want to do, Your Honor, is say he did an appraisal and throw out that million dollar number because they needed to get a number out there. I guess that would be my response. I do think it's an admissibility issue rather than a weight issue. I mean, if you took like a Daubert analysis, which I know the state courts don't do in Idaho, but in essence he hasn't followed the proper methodology.

Since I've moved to strike his testimony, I'd also like to move for a directed verdict first on count one of the amended complaint, which is breach of contract. There is no evidence in the record, by virtue of testimony, oral testimony, or depositions, that even suggests that a demand was made upon my clients for a rent adjustment. How can we be in breach of this agreement if they never put on evidence yesterday that they were requesting and demanding a rent adjustment?

What we've got here is back in -- we know that in 2007 they did not do anything. In 2010 they decided that they wanted to seek a rent adjustment, but Mr. Wadle did not testify at all about that. They haven't put any documents in --

MR. HAWKINS: I can probably stipulate on this and save a little time. I agree exactly with what Mr. Gaffney is saying. That hasn't been our strategy in the trial. We feel that the way we have alleged the complaint, and especially with the amendment for the declaratory judgment, and then as a result of a declaratory judgment, which effectively becomes the adjustment process that we're alleging, then that adjustment process itself results in the payment of the fair market value on the property for the years 2007 to current. So we would withdraw the first count regarding a breach of contract and damages from a breach.

THE COURT: All right.

MR. GAFFNEY: I'll shut up on that issue.

THE COURT: I agree with both counsel for the hospital and counsel for Quail Ridge in this matter. I did not hear any evidence yesterday that in my mind would have supported a breach of contract claim associated with this matter. It appears as though the plaintiffs have withdrawn that here today and have opted not to attempt to establish any breach of contract by way of their case in chief in this matter. At this point in time they appear to be seeking only declaratory relief with respect to that matter.

I would agree with Mr. Gaffney that the

evidence that was introduced yesterday was deficient in establishing that there had been a breach of contract associated with this matter. In fact, Mr. Wadle's testimony to that effect was that he had no information concerning whether or not there had ever been -- whether or not the hospital had ever invoked the arbitration provision of the Ground Lease Agreement. So I think that the defendant's motion for a directed verdict on count one of the complaint is in proper form and order. And I note that the plaintiffs have indicated here that they have not attempted to establish breach of contract based upon the amendment to the complaint and are withdrawing that claim.

So at this point in time the court will enter a directed verdict as relates to count one of the breach of contract, or count one of the complaint filed in this matter, and will dismiss count one pursuant to a directed verdict motion in this matter.

With that, then, Mr. Gaffney, that motion being granted, do you have any additional motions?

MR. GAFFNEY: Yes, Your Honor. I'd also like to move for a directed verdict on paragraphs 46, 47, and 48, which are in part of the declaratory relief claim. Paragraph 46 says that once this court has adjudged and declared how the fair market value is to be determined

under section 1.3(b) of the lease agreement, this court should further enter a judgment declaring the fair market value of the leased land for the 2007 and 2010 rent adjustment periods in the appropriate adjusted rent for each such period based upon the court's fair market value determinations. Then the next two paragraphs talk about basically that same issue.

It seems to me that in essence what they're asking for is exactly the same relief they were asking for under the contract theory. In other words, for you to determine that there is a deficiency from 2007 going forward. It's just kind of another way to try and get damages. I don't think that that is appropriate for a dec action claim. I think at most what the court could do, if the court found that there had to be an adjustment, the court would have to order the parties into arbitration per the agreement, because that is the way that that is supposed to be determined. In fact, I would suggest that these parties are -- the plaintiffs are in breach because rather than coming to us and seeking an adjustment and allowing us to dispute that adjustment and then going through the arbitration process, they short circuited it and came into court.

THE COURT: Well, I'll be honest, that has been a troubling issue to the court. I seem to recall one of

the form of testimony and --
THE COURT: And leading. Sustained.
Q. (BY MR. GAFFNEY) Now, from 1996 to 2001, did Pocatello Medical Investors stay as a subtenant to the building?
A. They did. They operated the building as a subtenant.
Q. Now, in 2001 did that -- did ownership of the building change?
A. It did, yes. The whole transaction was restructured in 2001.
Q. Okay. I want to walk you through that restructure. First of all, what was the reason that the transaction was restructured in 2001?
A. Sterling Development Group wanted to sell the building. Mr. Preston wanted to purchase the building. And by the building I mean the bricks and sticks, not the land. In addition, the Sterling Development Group principals wanted to be released from their individual guarantees. And they wanted to be released from the financing on the facility.
Q. Okay. So Sterling owed money on the building at that point?
A. That's correct. Sterling had a loan with PERSI, the Public Employees Retirement System of Idaho.

Q. Do you recall, at the time in 2001 when this transaction occurred, what the amount owing on that note was?
A. I believe it was approximately 2.8 million.
Q. All right.
A. Although I'm sure it's in the documents here somewhere.
Q. I'm sure it is, but it's not necessarily --
A. It was a lot of money.
Q. An estimate is good enough. So if I understand, why did Pocatello Medical Investors not just purchase the building directly from Sterling?
A. Because PERSI, the lender PERSI, had a policy of not making loans to operators of care facilities. So we had to create a new entity, Quail Ridge Medical Investors, LLC, to assume the loan.
Q. All right. And at that point I assume that Pocatello Medical Investors basically dropped out of the picture once that transaction was completed?
A. I'm sorry, but did you say Pocatello Medical?
Q. Did I say something else?
A. I might have misheard you. Pocatello Medical never dropped out. Pocatello Medical stayed in as the subtenant, stayed in that -- by subtenant I mean

the operator licensee of the facility. What happened in 2001 was that Quail Ridge Medical Investors, LLC, stepped into the position -- stepped into the shoes of the Sterling Development Group.
Q. All right.
A. So we just amended and restated the sublease agreement and Pocatello Medical stayed in as the subtenant.
Q. What was the arrangement between Pocatello Medical Investors and Quail Ridge since Pocatello Medical Investors stayed as the subtenant?
A. We had a sublease agreement.
Q. Was this a second sublease?
A. Well, we either had a substitute sublease or, my recollection is, that we amended and restated the old sublease.
Q. All right. The next question is during the 2001 restructure did you deal with any attorneys representing the hospital?
A. I did, yes.
Q. And was there any specific attorney that you dealt with?
A. Yes. Guy Kroesche, although I may be mispronouncing the last name.
Q. And he's with Stole Rives down in Salt Lake

City?
A. Yes.
Q. Was he in essence the -- I guess I'll use the counterpart lawyer assisting with this transaction on behalf of the hospital?
A. He was. He was representing --
MR. HAWKINS: Objection. Leading.
THE COURT: Sustained.
Q. (BY MR. GAFFNEY) What was his role with regard to the hospital?
A. He represented as counsel for the hospital.
Q. All right. Was there an exchange of documents during that -- first of all, how long did this transaction take to complete?
A. Gosh. I think the documentation took virtually a whole year back and forth.
Q. Back and forth between whom?
A. It was a four-way back and forth between our group and Sterling Development, involving PERSI and its counsel, and the landlord and its counsel. The landlord being the hospital, of course.
Q. Would you take a look at exhibits 218, 219 -- 218 through 224, please. Have you had a chance to look through those?
MR. HAWKINS: Your Honor, I forgot exactly which

guarantee of the ground lease?
A. It was, yes.
Q. All right. Why was that?
A. The original Sterling Development Group, the original tenant, the principals of that entity had guaranteed the ground lease and the landlord wanted a personal guarantor to stand behind the entity, Quail Ridge Medical Investors, LLC, which at that time was a newly formed entity.
Q. Now, when Pocatello Medical Investors became a subtenant in 2006 to the ground lease, did the hospital request any personal guarantees from Quail Ridge at that point?
A. No. Mr. Preston did not have to personally guarantee the sublease in 1996.
Q. So as part of the restructuring there was this additional requirement that was stipulated by the hospital?
A. Yes. The hospital required numerous changes and numerous amendments here, including that Mr. Preston personally guarantee the ground lease.
Q. If you'll look at exhibit 228 again, going back to paragraph five, it says that "under the lease tenant is obligated to pay rent at the current rate of $9,562.50 per annum. The rent has been paid through and

including February 28th, 2001."
Now, the language talking about rent adjustment that appears in the '96 estoppel certificate is not in this certificate here?
A. That's correct. I did not include it in the first draft.
Q. And why was that left out?
A. Because I had looked at what the parties had been doing since 1996, and for the five years that our group had been involved in the facility the rent adjustment mechanism had never been raised. And then I spoke with the folks from Sterling Development Group and understood that in the entire 13 years preceding our involvement no one had ever raised the section of the rent adjustment in order to increase or change the rent. So I wanted to confirm in the course of dealing that that had been waived.
Q. Did you, on behalf of Quail Ridge, view that as a significant modification to the ground lease?
MR. HAWKINS: Objection. Conclusion. Particularly in light of the court's previous ruling that this particular document is unambiguous and that parol evidence about the document is not going to be admitted.
THE COURT: I'm going to allow the answer. I

don't believe it was objected to concerning why he did not include that in the first draft. I'm going to sustain the objection as to did he view that as a significant modification to the ground lease. That would be sustained.
MR. GAFFNEY: I understand the second part. I did not understand the first part.
THE COURT: The first part was he previously stated why he did not include it in the first draft that he prepared. There was no objection to that. That I'll let stand and allow that.
Q. (BY MR. GAFFNEY) In Quail Ridge's willingness to provide a personal guarantee of the ground lease, what was the significance of that agreement related to provision five of the estoppel certificate?
MR. HAWKINS: Objection. Legal conclusion.
MR. GAFFNEY: It's not a legal conclusion, it's why they agreed to a personal guarantee, Your Honor.
MR. HAWKINS: Also an objection that this document has been declared unambiguous and now we're looking into outside circumstances in order to interpret it.
MR. GAFFNEY: We're not interpreting the document. I want to know what the relationship is between the two documents.

THE COURT: I'm going to overrule the objection and allow the question.
THE WITNESS: We wanted to nail down once and for all what the rent was. This document made numerous provisions and amendments to the ground lease. As part of that negotiating process we wanted to put to bed once and for all what the -- confirming what the course of conduct had been, but put to bed once and for all what the rent would be under the ground lease.
MR. HAWKINS: Your Honor, I move to strike the response. It wasn't responsive to the question that was asked and it did exactly what was previously barred by the court as giving an opinion as to the intent and purpose of the 2001 estoppel certificate, which is an unambiguous document and we don't need the attorney to come in and tell us what was done in that document or why it was done.
MR. GAFFNEY: Your Honor, only the party asking the question can move to strike as nonresponsive. The other party has to live with the answer.
MR. HAWKINS: Then I'm renewing the objection to the question, having heard the answer.
THE COURT: Just a minute. Only the party moving -- only the party asking the question can move to strike?

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FILED IN CHAMBERS

******

NOV 12 2012

12:30

HON. MITCHELL W. BROWN

POCATELLO HOSPITAL, LLC, dba PORTNEUF MEDICAL CENTERS, LLC,

Plaintiff,

vs.

QUAIL RIDGE MEDICAL INVESTORS, LLC and CENTURY PARK ASSOCIATES,

Defendants.

Case No. CV-2010-0002724-OC

ORDER ON FORM OF JUDGMENT

This action came before the Court for a two (2) day court trial commencing on May 14, 2012 and continuing through May 15, 2012. On October 17, 2012, the Court issued its Findings of Fact and Conclusions of Law. On October 22, 2012, the Court issued its Order Correcting Conclusions of Law. Pursuant to the Court's Findings of Fact and Conclusions of Law, the Court Ordered that the Plaintiff prepare a Declaratory Judgment consistent with the Court's Conclusions of Law.

Consistent with the Court's order, Plaintiff submitted a proposed Judgment. The proposed Judgment was in a different form than anticipated by the Court. Plaintiff's proposed Judgment was in the form of a money judgment against Defendant, Quail Ridge, in the sum of

EXHIBIT

tabbies

F

$416,812.50 and a declaration that the rent adjustment provision relative to the parties' Ground Lease Agreement remains in full force and effect and is subject to adjustment in 2013.[1]

Due to concerns that the Court had regarding whether a money judgment was appropriate, the Court scheduled a conference call with counsel for both parties. The Court expressed its concerns and advised the parties that they should submit briefing in support of their respective positions on the nature and form of judgment the Court should enter in this matter. Consistent with the Court's request, the parties filed simultaneous briefs on this issue. The Court has considered the submissions and now enters its Order.

DISCUSSION

Plaintiff's initial Complaint was couched in terms of a complaint for breach of contract. During the course of pre-trial motion practice, the Court advised that it was not certain relief could be granted to the Plaintiff on a breach of contract theory and opined that perhaps the relief Plaintiff was seeking was a declaration of the parties' rights pursuant to I.C. §§10-1201 through 10-1203.

Shortly thereafter, Plaintiff moved to amend its complaint to assert a claim for declaratory relief. The motion was granted, without objection from Quail Ridge. Therefore, this matter proceeded to trial on two (2) separate claims: (1) Breach of Contract, and (2) Declaratory Relief. At the conclusion of Plaintiff's case-in-chief, Quail Ridge moved for a directed verdict on Plaintiff's breach of contract claim. Plaintiff did not oppose Quail Ridge's motion and the Court granted the same.

However, had Plaintiff opposed Quail Ridge Motion for Directed Verdict on Plaintiff's Breach of Contract Claim, the Court would have been constrained to grant the motion because

[1]Plaintiff stated the date for adjustment to be January 27, 2013. However, the Court's Findings of Fact and Conclusion of Law establish that the effective date for the rent adjustment date is February 1, 2013 not January 27, 2013.

there was no evidence in the trial record to support a claim that Quail Ridge was in breach of contract. Rather, Quail Ridge had paid rent each month in the original amount of $9,562.50. *See* Court's Findings of Fact No. 18 and 19, Findings of Fact, Conclusions of Law and Memorandum Decision and Order, p. 14, ¶¶18-19.

As such, there was no evidence that Quail Ridge was in violation or had breached the terms of the Ground Lease Agreement. Similarly, the Court would also have concluded, had the Court been asked to make findings of fact and conclusions of law on this issue, that Quail Ridge had not violated the Ground Lease Agreement in failing to cooperate in the rent adjustment provisions.

For these reasons, the Court concludes that there are absolutely no facts in the record that would justify this Court entering a money judgment in favor of the Plaintiff. All the Court's Findings of Fact, Conclusions of Law and Memorandum Decision can properly be utilized for is to declare the parties' respective rights in relation to the Ground Lease Agreement. There has been no breach established to the Court as of the time of trial in this matter.

The parties' Ground Lease Agreement provides that "the party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment." Ground Lease Agreement, p.3, §1.3(b). Now that the determination has been made as contemplated under the Ground Lease Agreement, the Ground Lease Agreement requires "prompt" payment of the balance due under the Ground Lease Agreement.[2] Although the Ground Lease Agreement does not define the term prompt for purposes of the parties' agreement, a failure to pay this amount in a reasonable time certainly would give rise to an action for breach of contract.

[2]It should be noted that the parties' Ground Lease Agreement contemplated this determination being made by arbitration. However, both parties clearly and expressly waived this requirement, instead opting to proceed in this forum.

Therefore, because there has been no breach and the breach of contract claim was dismissed at trial, the Court will decline Plaintiff's request for entry of a money judgment. Certainly if "prompt" payment is not made consistent with this Court's determination, Plaintiff is entitled to avail itself of the courts in order to seek redress for this breach. However, this Court will limit its judgment to one of declaring the respective rights and obligations under the Ground Lease Agreement.

IT IS SO ORDERED.

Dated this 12th day of November, 2012.

SIXTH JUDICIAL DISTRICT
GREAT SEAL OF THE STATE OF IDAHO
DISTRICT COURT

Mitchell W. Brown

MITCHELL W. BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that on the 12th day of November, 2012, she caused a true and correct copy of the foregoing Order on Form of Judgment to be served upon the following persons in the following manner:

PLAINTIFF ATTORNEY: ☒ Faxed
Kent L. Hawkins
P.O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2499

DEFENDANT ATTORNEY: ☒ Faxed
Michael D. Gaffney
2105 Coronado State
Idaho Falls, Idaho 83404
(208) 529-9732

DALE HATCH, Clerk
Lynda Hampton
By: Deputy Clerk

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 OCT -7 PM 3:38
BY DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorneys for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Defendants' Memorandum in Opposition to Motion for Summary Judgment

The defendants (collectively Quail Ridge), through counsel of record Beard St. Clair Gaffney PA, respectfully submit the following Memorandum in Opposition to the Motion for Summary Judgment filed by the plaintiff, Pocatello Hospital, LLC dba Portneuf Medical Center, LLC (PMC). This memorandum in opposition to PMC's motion for summary judgment is supported by Quail Ridge's cross-motion and memorandum for summary judgment; the second affidavit of John M. Avondet, counsel for Quail Ridge; and other pleadings and affidavits in the record.

///

INTRODUCTION

This action is the second lawsuit between the parties. PMC previously sued Quail Ridge for breach of contract in Bannock County Civil Case No. 10-2724. At the trial for that matter, and upon the conclusion of PMC's case-in-chief, Quail Ridge moved for directed verdict. The Court in *PMC I* granted the motion. In fact, PMC voluntarily agreed to dismiss its breach of contract claim against Quail Ridge pursuant to Quail Ridge's directed verdict motion.

PMC now argues it is entitled to summary judgment in this action for its breach of contract claims against Quail Ridge and Forrest Preston. In so arguing, however, PMC ignores the limitations of res judicata and collateral estoppel, both of which preclude it from obtaining summary judgment over Quail Ridge as a matter of law, pursuant to Idaho Rule of Civil Procedure 56(c). Because PMC has not met its burden in showing that it is entitled to judgment as a matter of law, one of the requirements for obtaining summary judgment under Rule 56(c), the Court should deny PMC's motion for summary judgment.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." IDAHO R. CIV. P. 56(c) (2013); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991). It is recognized that when assessing the motion for summary judgment, the court must draw all facts and inferences in favor of the non-moving party. *G&M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994); *Haessley v. Safeco Title Ins. Co. of Idaho,* 121 Idaho 463, 825 P.2d 1119 (1992).

The moving party bears the burden of establishing the lack of a genuine issue of material

fact. If the moving party fails to make this showing, then summary judgment is inappropriate. *Tingley v. Harrison,* 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). The non-moving party is entitled to show a genuine issue of material fact regarding the elements challenged by the moving party's motion. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990) (citing *Celotex v. Catrett*, 477 U.S. 317 (1986)); *see also Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

If reasonable people could reach different conclusions or inferences from the evidence, the motion for summary judgment should be denied. *Thompson v. Pike*, 125 Idaho 897, 900, 876 P.2d 595, 598 (1994); *Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

STATEMENT OF FACTS

Quail Ridge references and incorporates its Statement of Facts contained in its cross-motion for summary judgment as if set forth fully herein. (*See generally* Defs.' Mem. Re: Cross-Mot. Summ. J. at 3-6.)[1]

ARGUMENT

Summary judgment is only appropriate in situations where the moving party meets its burden in showing that there is no genuine issue of material fact *and* that the moving party is entitled to a judgment as a matter of law. IDAHO R. CIV. P. 56(c) (2013). Quail Ridge does not concede PMC's argument that there are no genuine issues of material fact to bar PMC from its requested summary judgment. But because PMC has already brought these claims against Quail Ridge in *PMC I*, the general principle of res judicata, including "true" res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, bars PMC from a summary judgment as a matter of law under Rule 56(c). *See Pincock v. Pocatello Gold and Copper Mining Co.*, 100

[1] Submitted on September 23, 2013.

Idaho 325, 328, 597 P.2d 211, 214 (1979) ("It is well settled in Idaho that a trial judge should not grant a motion for summary judgment if the evidence, construed in the light most favorable to the party opposing the motion … presents a genuine issue of material fact or shows that the respondent … is not entitled to judgment as a matter of law. If either condition is satisfied, summary judgment [is] improper.") (internal citations omitted).

I. Res judicata precludes PMC from an entry of summary judgment as a matter of law.

"True" res judicata, or claim preclusion, "'treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or cause of action.'" *Aldape v. Akins*, 105 Idaho 254, 256, 668 P.2d 130, 132 (Ct. App. 1983) (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir. 1978)). Res judicata "bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action … which might have been made.'" *Kootenai Elec. Coop., Inc. v. The Lamar Corp.*, 148 Idaho 116, 120, 219 P.3d 440, 444 (2009) (quoting *Ticor Title v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)). Res judicata exists to preserve the integrity of judicial dispute resolution, protect the courts against the burdens of repetitious litigation, and provide refuge from the harassment of repetitious claims. *Aldape*, 105 Idaho at 247, 668 P.2d at 133.

Res judicata bars a party from asserting a claim in a subsequent action when three requirements are met: "(1) same parties, (2) same claim, and (3) final judgment." *Kootenai Elec. Coop.*, 148 Idaho at 120, 219 P.3d at 444 (quoting *Ticor Title*, 144 Idaho at 123, 157 P.3d at 617). All three requirements for res judicata are satisfied in this case.

First, the parties from *PMC I* are the same parties to this litigation. In *PMC I*, PMC sued Quail Ridge for breaching the Ground Lease Agreement. (Avondet 2d Aff. Ex. C.)[2] In this litigation, PMC is again suing Quail Ridge for breach of contract under the Ground Lease Agreement. This satisfies the first requirement for res judicata.

Second, and as set forth in Quail Ridge's memorandum in support of its cross-motion for summary judgment, the present claim for breach of contract is the same breach of contract claim litigated in *PMC I*. In determining what constitutes a claim for purposes of res judicata analysis, the Idaho Court of Appeals turned to the Restatement (Second) of Judgments § 24:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim ... the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction ... out of which the transaction arose.
>
> ***
>
> What factual grouping constitutes a "transaction" ... [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Aldape, 105 Idaho at 258-59, 668 P.2d at 134-35 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)) (omissions in original). *See also Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 149, 804 P.2d 319, 322 (1990) (Idaho Supreme Court citing with approval *Aldape*'s analysis of Restatement (2nd) of Judgments § 24).

In analyzing what constituted a separate claim under res judicata standards, the *Aldape* court looked further to the Restatement:

> Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the

[2] Submitted September 23, 2013.

> presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred.

Aldape, 105 Idaho at 259, 668 P.2d at 135 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. d (1982)).

Under this pragmatic framework, PMC's present breach of contract claim against Quail Ridge stems from the same transaction – the parties' Ground Lease Agreement – and is therefore not a new claim, but instead the same claim, rehashed, from *PMC I*. Because the same claim from *PMC I* is at issue in this litigation, the second requirement of res judicata is satisfied.

Finally, there is no dispute that a final judgment was issued in *PMC I* or whether Judge Brown granted directed verdict to Quail Ridge. (*See* Pl. Mem. Re: Pl. Mot. Summ. J. 10 ("[I]t is undisputed that there was a final judgment on the merits in [*PMC I*].").) The final judgment rendered in *PMC I* satisfies the third and last requirement for res judicata.

In *PMC I*, Judge Brown granted directed verdict to Quail Ridge on PMC's breach of contract claim. Now, in this case, PMC has "decided to seek more favorable relief in a different court. In essence, it sought to split its cause of action so as to obtain a further bite at the apple." *Kootenai Elec. Coop.*, 148 Idaho at 122, 219 P.3d at 446. Res judicata exists to avoid such a result. *Id.* Because this action shares the same parties and claim as those in *PMC I*, and because Judge Brown entered a directed verdict and final judgment in *PMC I*, res judicata bars PMC from a judgment as a matter of law under Rule 56(c). PMC has failed to meet its burden in showing that summary judgment would be appropriate, and the Court should deny summary judgment.

II. Collateral estoppel precludes PMC from an entry of summary judgment as a matter of law.

Collateral estoppel, or issue preclusion, "bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties." *Aldape v. Akins*, 10 Idaho 254, 257, 668 P.2d 130, 133 (Ct. App. 1983) (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978)). "Collateral estoppel serves the purposes of protecting litigants from the burden of relitigating an identical issue with the same party or his privy, of promoting judicial economy by preventing needless litigation, or preventing inconsistent decisions, and of encouraging reliance on adjudications." *Anderson v. Pocatello*, 112 Idaho 176, 183, 731 P.2d 171, 178 (1986) (internal citations omitted).

For collateral estoppel to bar a subsequent claim, five requirements must be satisfied: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the earlier case is identical to the issue in the present action; (3) the issue sought to be precluded was decided in the earlier action; (4) there was final judgment on the merits in the earlier case; and (5) the party against whom the issue is asserted in the present case was a party or in privity with a party to the litigation. *Kootenai Elec. Coop.*, 148 Idaho at 120, 219 P.3d at 444 (citing *Ticor Title*, 144 Idaho at 124, 157 P.3d at 618). As outlined previously in Quail Ridge's memorandum in support of its cross-motion for summary judgment, all five requirements for collateral estoppel have been satisfied.

First, PMC had a full and fair opportunity to litigate its breach of contract claim against Quail Ridge. At trial, PMC presented its case-in-chief on its breach of contract claim against Quail Ridge. (Avondet 2d Aff. Ex. D.) After PMC concluded its argument regarding its breach of contract claim against Quail Ridge, PMC voluntarily agreed to dismiss the claim. (*Id.* Ex. E;

PMC I Trial Tran. Vol. II, 86:1-12, May 15, 2012.) PMC was not deprived of its opportunity to fully and fairly litigate its breach of contract claim against Quail Ridge.

Second, the issue to be decided in this action – PMC's breach of contract claim against Quail Ridge – is identical to the issue decided in *PMC I*. *See supra*. Both cases asserted that Quail Ridge breached the Ground Lease Agreement for the 2010 rent adjustment period by refusing to pay $416,812.50 after offsets.

Third, the issue of Quail Ridge's alleged breach of the Ground Lease Agreement was decided in the earlier litigation, with Judge Brown dismissing PMC's breach of contract claim against Quail Ridge. (Avondet 2d Aff. Ex. D.)

Fourth, Judge Brown entered a final judgment in the earlier case. *See supra*.

Finally, Quail Ridge, the party against whom PMC's present breach of contract claim is asserted, was a party to the earlier litigation. *See supra*.

Because all five requirements for collateral estoppel have been satisfied in this action, collateral estoppel bars PMC from pursuing its present breach of contract action against Quail Ridge. PMC is not entitled to a summary judgment as a matter of law under Rule 56(c), and the Court should deny PMC's motion for summary judgment.

III. Res judicata precludes PMC from an entry of summary judgment against Forrest Preston as a matter of law.

As argued in Quail Ridge's memorandum in support of its cross-motion for summary judgment, res judicata bars PMC from pursuing its breach of contract claim against Forrest Preston, owner and principal of Quail Ridge. (Avondet 2d Ex. C.) Once again, PMC's present action shares the same parties and the same claim as *PMC I*.

As addressed by Quail Ridge in its memorandum in support of its cross-motion for summary judgment, Preston is a privy of Quail Ridge. (Defs.' Mem. Re: Defs' Mot. Summ J. 9.)

This point is undisputed, as in its brief in support of its motion for summary judgment, PMC notes that "[a]lthough Preston was not a named party to the prior action, it is undisputed that *Preston is the primary principal of Quail Ridge*." ((Pl. Mem. Re: Pl. Mot. Summ. J. 10 (emphasis added).) Because Preston is privy of Quail Ridge, the parties of *PMC I* are the same parties to this present litigation.

PMC's breach claim against Preston is also the same claim at issue in *PMC I*. Claim preclusion applies to claims brought, as well as those that could have been brought, in the prior litigation. *Berkshire Investments, LLC v. Taylor*, 278 P.3d 943, 951 (2012). As noted by the *Aldape* court, "the transactional concept of a claim is broad, and … the bar of claim preclusion is similarly broad." *Aldape*, 105 Idaho 254, 259, 668 P.2d 130, 135 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982)). PMC has no excuse for its failure to bring a breach claim against Preston in *PMC I*. It is now estopped from doing so because of res judicata. Because PMC is not entitled to a judgment as a matter of law under Rule 56(c) regarding its breach claim against Preston, PMC has failed to meet its burden to show it is entitled to summary judgment under Rule 56(c). This Court should deny PMC's motion for summary judgment.

IV. Alternatively, the Court should find that there are triable issues of material fact precluding summary judgment.

In the event that the Court does not agree that PMC's claims are barred by res judicata and/or collateral estoppel, the Court should still deny the motion for summary judgment. PMC's claims are fundamentally based upon Judge Brown properly construing the Ground Lease Agreement's terms, conditions, and language. If Judge Brown erred in his application of the law to the facts of *PMC I*, the basis for this second lawsuit will be extinguished. Quail Ridge has appealed Judge Brown's findings and the Amended Declaratory Judgment that he entered on November 26, 2012. (Avondet 2d Aff. Ex. A.)

Therefore, there are two grounds for denying the summary judgment motion in addition to those articulated *supra.* First, there are triable issues whether Quail Ridge has failed to have "promptly paid" the amounts Judge Brown found were owed under the Ground Lease Agreement. The second basis is that the issue is not ripe and there is a risk of reaching inconsistent results in two interrelated lawsuits.

a. *Triable issues exist whether there has been a breach.*

Judge Brown's Amended Declaratory Judgment stated that Quail Ridge was to "promptly pay" the amount identified in the Amended Declaratory Judgment. Judge Brown did not articulate a specific time period when payment was to occur. Quail Ridge does dispute whether it has failed to promptly pay the amounts Judge Brown held were owed under the Ground Lease Agreement. Quail Ridge submits that the determination of whether Quail Ridge has breached the contract is an issue of fact.

PMC pins its argument on the fact that it made a demand for payment following Judge Brown's issuance of the Amended Declaratory Judgment and that Quail Ridge did not meet the terms of the PMC demand letter. (Pl. Mem. Re: Pl. Mot. Summ. J. at 5-7.) PMC's argument, however, is flawed because the demand letter did not comport with the terms of the Amended Declaratory Judgment. The Amended Declaratory Judgment provides, in relevant part:

> (4) Therefore, based upon the rent adjustment, Quail Ridge is obligated to promptly pay PMC $416,812.50 under the terms of the parties' Ground Lease Agreement.

(Hancock Aff. Ex. 2.) The phrase "promptly pay" is ambiguous. Though the promptly pay language is found in the Amended Declaratory Judgment, the document purports to set forth contractual obligations. Thus, if the duties of the parties are ambiguous, the general rules of contract construction should apply.

Juries are arbiters of contractual ambiguities. *Potlach Education Ass'n v. Potlach School Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). Judge Brown did not state a specific time period for performance of the payment obligation. He ambiguously described the obligation as one to "promptly pay" the $416,812.50. He did not parse the terms any further. Whether Quail Ridge has not promptly paid PMC is a question of fact.

The term "promptly pay" is subject to differing interpretations and is based upon the facts and circumstances of each case. Black's Law Dictionary defines the term "promptly" as follows:

> Adverbial form of the word "prompt," which means ready and quick to act as occasion demands. *Missouri, K. & T. Ry. Co. v. Missouri Pac. Ry. Co.*, 103 Kan. 1, 175 P. 97, 103. The meaning of the word depends largely on the facts in each case. *Irvin v. Koehler, C.C.A.B.Y.*, 230 F. 795, 796; *Stovall & Strickland v. McBrayer*, 20 Ga.App. 93, 92 S.E. 543.

BLACK'S LAW DICTIONARY 1379 (4TH ED. 1968). In *Rierson v. State*, 614 P.2d 1020, 1023 (Mont. 1980), the Montana Supreme Court stated that the meaning of "promptly" was "ready and quick to act, depending on the circumstances." *Id.* The Court has sufficient evidence before it that generates triable issues of material fact whether Quail Ridge has acted consistent with Judge Brown's findings.

There is no dispute that the amount identified by Judge Brown has not been paid by Quail Ridge. The fact that there has not been payment, however, does not mean that when Quail Ridge does tender payment that the payment will not have been promptly made at that point in time. This case is unique because the rights of the parties were declared by a Court of law and those findings have been appealed to a court of appellate review. Thus, the rights of the parties remain in flux and could be altered in the future by the Idaho Supreme Court. There is no agreed upon statement of what is owed under the Ground Lease Agreement because of the appeal in Bannock County Civil Case No. 2010-2724. Whether Quail Ridge has acted promptly vis-à-vis the Ground Lease Agreement is subject to the appeal's outcome and cannot be determined now.

In the *PMC I* appeal, Quail Ridge has asserted that the judge made errors of law and fact in reaching his conclusions in *PMC I* and in calculating the rent owed for the 2010 adjustment period. (Gaffney Aff. Ex. A; *see also* Avondet 1st Aff. Ex. A, submitted on February 6, 2013.) If Quail Ridge prevails before the Idaho Supreme Court, then the Amended Declaratory Judgment will be vacated and there would be no obligation to pay PMC the adjusted rent amount set by Judge Brown. If the Supreme Court affirms Judge Brown, then the obligations of the parties for the 2010 adjustment period will likely be settled. It is only *after* the appeal has been adjudicated that the jury or the Court could even decide whether Quail Ridge has promptly made payment. At this point, however, a jury could reasonably decide that Quail Ridge has acted properly and that a payment made following the appeal would constitute a prompt payment under the Amended Declaratory Judgment.

PMC suggests that its 10-day demand establishes what would constitute prompt payment as a matter of law. However, whether payment has been promptly made is a determination based upon the totality of the facts and circumstances of each case. *See Rierson*, 614 P.2d at 1023. The correct outcome in this case is intrinsically tied to the outcome of the appeal in *PMC I*. The Court cannot decide as a matter of law that Quail Ridge's refusal to pay pursuant to PMC's demand qualified as a failure to promptly pay the amount outlined in the Amended Declaratory Judgment. It is a disputed issue that a jury could find that Quail Ridge properly waited until after the appeal to pay any obligation.

b. The issue is not ripe and there is a risk of reaching inconsistent results in two interrelated lawsuits.

The interdependent nature of the two cases was the reason why Quail Ridge asked for a stay in March 2013. The propriety of this lawsuit depends on the outcome of the appeal in *PMC I*. Judge Brown found in *PMC I* that there was no basis for awarding PMC a money judgment

that could be executed upon by PMC. (Avondet 2d Aff. Ex. D.) Because there was no money judgment to execute upon in *PMC I*, there was no requirement for an Idaho Appellate Rule 16 supersedeas bond.

Quail Ridge's prior motion was also improperly construed as a motion for stay for a new trial or for judgment under Rule 62(b). Quail Ridge did not seek a stay on any motion for a new trial or a stay of an effort to enforce a judgment. The judgment received by PMC in *PMC I* was not a money judgment that could be enforced. (*Id.*) It merely declared rights. Thus, there was no legal justification for requiring the posting of a bond or securing PMC against its eventual collection efforts. This proceeding is not "any proceeding to enforce a judgment" because PMC only asserts (a) breach of contract and (b) enforcement against a guarantee. (*See* Compl. ¶¶ 14-24.) Rule 62(b) is limited to staying proceedings only when a motion for a new trial or to alter or amend a judgment has been made pursuant to Rule 59 in the underlying proceedings. *See* IDAHO R. CIV. P. 62(b) (2013). The grounds for staying execution of a money judgment are simply not met in this case. The entire premise of Quail Ridge's prior motion for a stay was because the validity of any outcome in this case is inherently based on the outcome of the appeal in *PMC I.* No security should ever have been required in connection with a stay in this case.

Quail Ridge submits that the Court should defer this matter until such time as the appeal has been decided. There is a risk of inconsistent results in the two cases. Staying the matter, without the requirement of a bond, will not prejudice PMC because (a) it does not have a judgment that it can enforce anyway at this point and (b) the outcome of the appeal will, for all intents and purposes, determine the outcome of this case.

V. Quail Ridge is not collaterally estopped from asserting its affirmative defenses against PMC.

In its brief in support of its motion for summary judgment, PMC argues that Quail Ridge is collaterally estopped from raising its affirmative defenses against PMC in the present action. (*See generally* Pl. Mem. Re: Pl. Mot. Summ. J. 8-11.) Specifically, PMC argues that because Quail Ridge's affirmative defenses relate to the parties' Ground Lease Agreement, which was at issue in *PMC I*, Quail Ridge cannot raise them in this action. *See id.* This argument is completely incongruous with PMC's position as plaintiff in this second lawsuit. As PMC notes in its brief in support of summary judgment, "[b]oth cases revolve around the 1983 Ground Lease Agreement that governs the rights and responsibilities of the parties." *Id.* at 10. PMC is essentially arguing that while it should be granted summary judgment on its current breach of contract claims against Quail Ridge, which are based on Quail Ridge's alleged breach of the Ground Lease Agreement, Quail Ridge cannot assert affirmative defenses it raised against PMC's first breach of contract claim in *PMC I.* PMC cannot have it both ways.

Further, PMC makes a blanket argument that Quail Ridge's affirmative defenses to this action have already been adjudicated by Judge Brown in *PMC I.* (Pl. Mem. Re: Pl. Mot. Summ. J. 9.) However, this is not an accurate representation. Quail Ridge did not raise all of its affirmative defenses to this present claim against PMC in *PMC 1*. Later in its collateral estoppel argument, PMC only lists a select number of Quail Ridge's affirmative defenses to this claim as having been addressed in *PMC I. Id.* at 10. Arguing that Quail Ridge is collaterally estopped from asserting all of its affirmative defenses in this present action is therefore an incorrect overstatement at odds with PMC's litigation posture in this action. The Court should therefore disregard PMC's argument that Quail Ridge is collaterally estopped from asserting its affirmative defenses in this claim.

CONCLUSION

The motion for summary judgment should be denied. Alternatively, the Court should stay this matter until the Idaho Supreme Court has determined the appeal in *PMC I*.

DATED: October 7, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on October 7, 2013, I served a true and correct copy of the MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☑ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☑ Hand-delivered ☐ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2019 OCT -7 PM 3:38
BY _____ DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorney for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Affidavit of Michael D. Gaffney in Opposition to Plaintiff's Motion for Summary Judgment

STATE OF IDAHO)

)ss.

County of Bonneville)

I, Michael D. Gaffney, having been duly sworn on oath, depose and state:

1. I am an attorney with the law firm, Beard St. Clair Gaffney PA, and counsel of record for Defendants in the above-entitled action.

2. I am competent to testify and do so through personal knowledge.

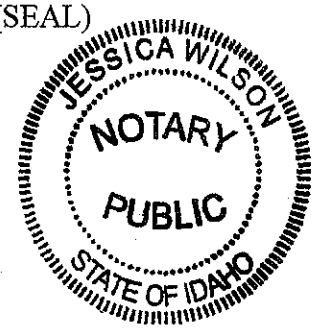
3. Attached as Exhibit A is a true and correct copy of the Appellant Brief dated May 7, 2013.

DATED: October 7, 2013

Michael D. Gaffney
Of Beard St. Clair Gaffney PA

Subscribed and sworn to before me on this 7th day of October, 2013.

Notary Public for Idaho
Residing at: Idaho Falls, ID
My Commission Expires: 9/11/14
(SEAL)



CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on October 7, 2013, I served a true and correct copy of the AFFIDAVIT OF MICHAEL D. GAFFNEY IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Bannock County Courthouse 624 E. Center Pocatello, ID 83201 Fax: (208) 236-7012	☐ U.S. Mail	☑ Hand-delivered	☐ Facsimile
Dave R. Gallafent R. William Hancock Merrill & Merrill PO Box 991 Pocatello, ID 83204 Fax: (208) 232-2499	☐ U.S. Mail	☑ Hand-delivered	☐ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 40566-2012

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTERS, LLC;
Plaintiff/Respondent

v.

QUAIL RIDGE MEDICAL INVESTORS, LLC; Defendant/Appellant

and

CENTURY PARK ASSOCIATES; Defendant

APPELLANT BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Bannock.
Honorable Mitchell W. Brown, District Judge, presiding.

Michael D. Gaffney
John M. Avondet
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404

Attorneys for Defendant/Appellant Quail Ridge Medical Investors, LLC

Kent L. Hawkins
R. William Hancock
Merrill & Merrill, Chartered
P.O. Box 991
Pocatello, Idaho 83204

Attorneys for Plaintiff/Respondent Pocatello Hospital, LLC d/b/a Portneuf Medical Centers, LLC

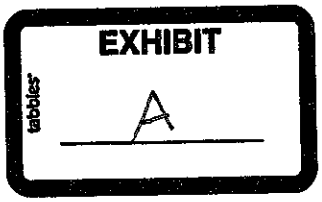


TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules (2012)

Other Authorities

I. STATEMENT OF THE CASE

A. Nature of the Case.

The plaintiff/respondent, Pocatello Hospital, LLC d/b/a Portneuf Medical Centers, LLC (PMC), filed a Verified Complaint alleging breach of a Ground Lease Agreement against two defendants: Quail Ridge Medical Investors, LLC (Quail Ridge) and Century Park Associates, LLC (Century Park). PMC subsequently sought, and received, leave to amend its Complaint and added a claim for declaratory relief. The defendants filed an Answer and Jury Demand. The case was tried to the Court on May 14-15, 2012, in Bannock County District Court. The Court entered its Findings of Fact and Conclusions of Law on October 17, 2012, and entered an Amended Declaratory Judgment on November 26, 2012. This appeal followed.

B. Course of Proceedings

PMC filed a Verified Complaint against Quail Ridge and Century Park on February 28, 2010. (R Vol. I, pp. 1-51.) The Verified Complaint alleged that Quail Ridge and Century Park were successors-in-interest to a certain Ground Lease Agreement that had been entered into by Intermountain Health Care, Inc. (IHC) and Sterling Development Co. (Sterling) in 1983. (*Id.*) The Ground Lease Agreement pertained to real property located within the City of Pocatello. (*Id.*) The Verified Complaint alleged that both Quail Ridge and Century Park had breached the Ground Lease Agreement and had failed to pay an adjusted amount of rent. (*Id.*, pp.1-51.) Quail Ridge and Century Park filed an Answer and Jury Demand on August 2, 2010. (*Id.*, pp. 54-57.)

All parties filed dispositive motions. The district court heard argument on the motions on August 5, 2011. (*Id.*, p. 60.) The district court took the motions under advisement. (*Id.*) The

district court orally announced its decision regarding the dispositive motions on January 7, 2012. (*Id.*, p. 62.) The Court denied the motions. (*Id.*)

PMC asked for and received leave to amend its complaint. PMC filed an Amended Complaint on May 4, 2012. (*Id.*, pp. 96-104.) Quail Ridge and Century Park answered the Amended Complaint on May 7, 2012, a week before trial. (*Id.*, pp. 105-09.)

The case was tried without a jury on May 14-15, 2012. (*Id.*, pp. 128-29.) During trial, Quail Ridge and Century Park moved for directed verdict on Count I of the Amended Complaint. (*Id.*, p. 129.) Count I alleged breach of contract against the defendants. (*Id.* pp. 96-104.) PMC stipulated to dismiss its breach of contract claim and the district court granted the defendants' motion. (*Id.*, p. 129.) Century Park moved for a dismissal of the remaining declaratory relief claim and PMC also stipulated to the motion. (*Id.*)

The parties submitted post-trial briefing to the district court. (*Id.*, pp. 135-63.) The district court entered its Findings of Fact and Conclusions of Law on October 17, 2012. (*Id.*, pp. 166-203.) The district court found that PMC was not entitled to adjusted rent for 2007-09 but also found an entitlement to adjusted rent for 2010-12. (*Id.*, p. 201.) The district court entered a Declaratory Judgment on November 13, 2012, and an Amended Declaratory Judgment on November 26, 2012. (R Vol. II, pp. 214-18.) Quail Ridge timely appealed. (*Id.*, pp. 219-226.)

C. Statement of Facts.

PMC is a Delaware LLC licensed and authorized to do business within the state of Idaho. (R Vol. I, pp. 96-104.) Quail Ridge, the sole defendant/appellant, is a Tennessee LLC licensed and authorized to do business within the state of Idaho. (*Id.*, pp. 105-09.)

Quail Ridge is an assisted living facility located in Pocatello, Idaho. (Trial Tr. Vol. II, 139:7-13, May 15, 2012.) The assisted living center facility is located on approximately 4.25 acres in Pocatello, Idaho. (*Id.*, 139:14-18.) Quail Ridge owns the facility. (*Id.*) PMC owns the 4.25 acres of real property. (*Id.*, 139:21-140:1; Trial Tr. Vol. I, 36:1-3, May 14, 2012.)

In January 1983, IHC and Sterling entered in a Ground Lease Agreement (Ground Lease) pertaining to the 4.25 acres of property involved in this case. (Trial Tr. Vol. II, 140:2-22; Pl. Ex. 101.) The Ground Lease governs, in part, the current parties' relationship. There is no dispute whether PMC is the successor-in-interest to the lessor's (IHC) interest in the Ground Lease. Quail Ridge similarly acknowledges that it is the successor-in-interest to the lessee's (Sterling) interest. Section 1.3(a) of the Ground Lease establishes the initial value for determining rent. The section provides:

> An initial annual rental shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre.

(Pl. Ex. 101.) Section 1.3(b) discusses adjustment of the rent value and provides, in part:

> The annual net rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date. . . . The rent as adjusted shall be equal to fifteen percent (15%) of the fair market value of the leased land, exclusive of the improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. *The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applies to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.* (emphasis added)

(*Id.*) The last paragraph of Section 1.3(b) states:

> If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.

(*Id.*) Under the Ground Lease, Quail Ridge paid PMC rent in the amount of $9,562.50 per annum. (Trial Tr. Vol. II, 141:14-15, Def. Exs. 256, 257.) No one ever adjusted the rent amount during the intervening years and once Quail Ridge became subject to the Ground Lease it paid the rent every year in the amount of $9,562.50. (Trial Tr. Vol. II, 144:17-24; 150:5-15, 20-24.)

Earl Christison, former Pocatello Regional Medical Center (PRMC)[1] CEO/administrator from 1989-2000, reviewed all PRMC contracts including the Ground Lease during his tenure. (R Vol. II, pp. 308-10.) Christison testified during his deposition that PRMC would have gone through each contract and "either renegotiated them or re-evaluated how they existed" on a local and corporate level. (*Id.*) Christison testified that the hospital would have tried to "squeeze every nickel and dime out of what [the hospital] could have got from them at the time[.]" (*Id.*) The land values from 1989-2000 would not have supported an adjusted rent and so PRMC did not adjust the rent. (*Id.*, pp. 308-10.) Don Wadle, vice-president of clinical support for PMC, confirmed that rent had not been adjusted since 2002 when PMC took over the IHC facility. (Trial Tr. Vol. I, 38:14-39:10.)

In 1996, an entity named Pocatello Medical Investors Limited Partnership (PMI) began operating the facility known as Quail Ridge. (Trial Tr. Vol. II, 145:9-18.) PMI subleased the building from Sterling, the original tenant. (*Id.*, 145:9-18.) PMI transitioned the facility from a

[1] PRMC was the name of the IHC facility in Pocatello.

psychiatric hospital into an assisted living facility. (*Id.*, 147:20-25.)

In 1996, PMC's predecessor, IHC, signed a Landlord Consent and Estoppel Certificate (the 1996 Landlord Consent and Estoppel Certificate) certifying to PMI that the rent was $9,562.50 per annum and that the rent would be adjusted at the next adjustment period. (Def. Ex. 211, ¶ 5.) Counsel represented IHC during the 1996 transaction. (Trial Tr. Vol. II, 152:2-11.) Neither PMI nor Quail Ridge's records evidence a request by the landlord to adjust the rent. (*Id.*, 150:25-151:23.) PMI continued to sublease from Sterling from 1996-2001. (*Id.*, 153:3-7.)

In 2001, the parties substantially restructured their relationship. (*Id.*, 153:8-11.) Sterling sought to sell the building. Forrest Preston, PMI and Quail Ridge's owner, wanted to buy the building. (*Id.*, 153:12-21.) Sterling's principals wanted to be released from their guarantees of the Ground Lease and also wanted Sterling released from the financing on the building. (*Id.*) Sterling owed approximately $2.8 million on the building. (*Id.*, 154:1-4.)

The 2001 restructure resulted in Quail Ridge stepping into Sterling's shoes vis-à-vis the Ground Lease. (*Id.*, 154:18-155:4.) The parties amended and restated the old sublease with Quail Ridge becoming the sublessor and PMI remaining as subtenant. (*Id.*, 155:9-16.)

IHC retained Guy Kroesche, an attorney with Stoel Rives in Salt Lake City, Utah, to represent it during the restructuring of the parties' arrangement. (*Id.*, 156:9-11.)

Kroesche negotiated terms of the 2001 restructure with Richard Faulkner, in-house counsel for PMI/Quail Ridge. Kroesche made changes to the documents of the restructure and many of his changes were "crafted towards rewriting the existing agreements." (R Vol. II, p. 291.) Kroesche received all of the documents involved in the restructure and commented on

many of them. (Trial Tr. Vol. II, 164:8-17; Def. Ex. 228). The documents included a new Landlord Consent and Estoppel Certificate (the 2001 Landlord Consent and Estoppel Certificate). (*Id.*, 164:13-23; Def. Ex. 228.) Kroesche specifically edited the 2001 Landlord Consent and Estoppel Certificate to add provisions that required a guarantee of the payments under the Ground Lease. (*See id.*) This addition constituted a new term to the parties' arrangement. (Trial Tr. Vol. II, 164:22-23.) Forrest Preston's personal guarantee also constituted another new term for the 2001 restructuring, in addition to other changes and amendments in the deal. (*Id.*, 165:19-21.)

The 2001 Landlord Consent and Estoppel Certificate is different than its 1996 counterpart. The 2001 Landlord Consent and Estoppel Certificate never makes reference to the ability to adjust rent at the next adjustment date under the Ground Lease. (Def. Ex. 228, ¶ 5.) Instead, the language about rent being adjusted at the next adjustment date is conspicuously absent in the 2001 iteration. Faulkner, who acted as Quail Ridge's corporate representative during trial, testified about why the 2001 Landlord Consent and Estoppel Certificate differed from its 1996 counterpart. Faulkner said:

> Because I had looked at what the parties had been doing since 1996, and for the five years that our group had been involved in the facility the rent adjustment mechanism had never been raised. And then I spoke with the folks from Sterling Development Group and understood that in the entire 13 years preceding our involvement no one had ever raised the section of the rent adjustment in order to increase or change the rent. So I wanted to confirm in the course of dealing that it had been waived.

(Trial Tr. Vol. II, 166:7-17.) Per Faulkner's testimony, in 2001, Quail Ridge "wanted to put to bed once and for all what the rent was going to be. So in Mr. Preston agreeing to personally guarantee the lease, he wanted to know what the rent was. This served to confirm what the

course of dealing had been for all that many years before this." (*Id.*, 170:8-16.) Neither IHC nor IHC's attorney ever asked Faulkner to change the 2001 Landlord Consent and Estoppel Certificate's language in paragraph 5. (*Id.*, 170:21-24.)

After 2001, Quail Ridge paid off several million dollars in debt associated with the loan related to the Quail Ridge facility. (*Id.*, 171:20-172:4.) Quail Ridge made the decision to pay off debt because it relied on knowing that the Ground Lease rent had been set at a fixed amount and was no longer subject to the rent adjustment provision of the Ground Lease. (*Id.*, 172:11-20.) Quail Ridge also decided to invest more than $1 million in building renovations due to its understanding that the rent had been fixed at a set amount. (*Id.*, 174:2-7.) As Faulkner testified, no one had invoked paragraph 1.3(b) of the Ground Lease at any time during its existence. (*Id.*, 178:8-19.) One of the critical roles the 2001 restructure played was to "nail down what the rent under the ground lease was going to be going forward." (*Id.*, 182:14-19.)

In 2002, PMC became the successor in interest to IHC's interests in the Ground Lease. (Trial Tr. Vol. I, 39:6-9.) It did not immediately seek to adjust the rent. (*Id.*, 36:7-37:20.) In 2008, PMC began researching the Ground Lease and claimed that it had made a mistake in managing the Ground Lease and that it had failed to adjust the rent as set forth in paragraph 1.3(b). (*Id.*) The lawsuit is the first time that any party sought to adjust the rent.

II. ISSUES PRESENTED ON APPEAL

A. Whether the district court erred by not finding modification.

B. Whether the district court erred by failing to find waiver.

C. Whether the district court erred by not applying estoppel to bar PMC's claim.

D. Whether the district court erred by disregarding the Ground Lease' language.

E. Whether the district court erred by not finding a course of dealing.

F. Whether the district court erred in admitting the testimony of Brad Janoush.

III. ARGUMENT

A. Standard of Review

When reviewing a district court's decision after a trial without a jury, the Court's review of the decision:

> [I]s limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. A district court's findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the district court's role as trier of fact. It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. We will not substitute our view of the facts for the view of the district court. Instead, where findings of fact are based on substantial evidence, even if the evidence is conflicting, those findings will not be overturned on appeal. We exercise free review over the lower court's conclusions of law, however, to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. *Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 706-07, 52 P.3d 848, 851-52 (2002) (quoting *Nampa & Meridian Irr. Dist. v. Wash. Fed. Sav.*, 135 Idaho 518, 521, 20 P.3d 702, 705 (2001)).

Clayson v. Zebe, 280 P.3d 731, 735 (Idaho 2012). Substantial evidence is that which a reasonable trier of fact would accept and rely upon it in determining findings of fact. *Duspiva v. Fillmore*, 293 P.3d 651, 655 (Idaho 2013).

B. The district court erred by not finding a modification.

The district court erred when it ruled that the parties had not modified paragraph 1.3(b) of the Ground Lease in 2001. Quail Ridge raised this issue in a pretrial motion in limine, which the district court denied on May 4, 2012. (R Vol. I, pp. 123-25; Hr'g Tr. 15:20-19:22, May, 4, 2012.) Quail Ridge also argued post-trial that the 2001 Landlord Consent and Estoppel Certificate modified the Ground Lease, constituted a waiver, and barred PMC from adjusting the rent. (R Vol. I, pp. 153-63.) The district court misapplied the law governing estoppel certificates and reached an incorrect result. The Court should reverse the district court's findings and rule that the parties modified the terms of 1.3(b).

Contracts may be modified by mutual consent of the parties. *Watkins Co., LLC v. Storms*, 272 P.3d 503, 508 (Idaho 2012) (citing *Ore-Ida Potato Prods., Inc. v. Larsen*, 83 Idaho 290, 293, 362 P.2d 384, 385 (1961)). The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of a change proposed by the other. *Watkins Co., LLC v. Storms*, 272 P.3d at 508. Consent to a modification may be implied from a course of conduct consistent with the asserted modification. *Res. Eng'g. Inc. v. Siler*, 94 Idaho 935, 938, 500 P.2d 836, 839 (1972). Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and the opportunity to object to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement. RESTATEMENT (SECOND) CONTRACTS § 202(4).

The 2001 Landlord Consent and Estoppel Certificate establishes a modification of the Ground Lease. "An 'estoppel certificate' is a common device used in real estate transactions. It consists of a 'signed statement by a party (such as a tenant or mortgagee) certifying for another's benefit that certain facts are correct, as that a Lease exists, that there are no defaults, and that rent is paid to a certain date.'" *Lakeview Mgmt., Inc. v. Care Realty, LLC*, 2009 U.S. Dist. LEXIS 28171, *54 (March 30, 2009). "A party's delivery of this statement estops that party from later claiming a different set of facts." *Id.*; *see also K's Merch. Mart, Inc. v. Northgate Ltd. P'ship*, 835 N.E.2d 965, 971 (Ill. 2005). "A party who executes an estoppel certificate should not be allowed to raise claims of which it knew or should have known at the time the certificate was executed." *K's Merch. Mart, Inc.*, 835 N.E.2d at 972. "An estoppel certificate binds the signatory to the statements made and estops that party from claiming to the contrary at a later time." *Plaza Freeway Ltd. P'ship v. First Mountain Bank*, 81 Cal. App. 4th 616, 626, 96 Cal. Rptr.2d 865, 872 (2000). In *Plaza Freeway Limited Partnership*, the Court found that "the estoppel certificate served to set forth the key terms of the lease agreement, as understood by the tenant at the time of the plaintiff's purchase of the property." *Id.* at 628, 96 Cal.Rptr.2d at 873.

No party disputes that the Ground Lease originally provided a mechanism for adjusting rent. (Pl. Ex. 101.) Also, no one is arguing that rent was adjusted at any time from 1983-2009. (R Vol. I, p. 179.) The lawsuit is the first attempt to adjust the rent in approximately twenty-seven years. Two transactions, in 1996 and 2001, demonstrate that a modification occurred and that the ability to adjust rent was removed from the parties' arrangement by mutual assent. The district court failed to accurately apply the law to the facts and erred as a consequence.

In 1996, PMI became Sterling's subtenant and operated a facility known as Quail Ridge. (Trial Tr. Vol. II, 145:9-147:5, May 15, 2012.) PMI and Sterling entered into a sublease agreement attendant to that transaction. (*Id.* 147:4-5.) One of the documents executed as a part of the 1996 transaction was a Landlord Consent and Estoppel Certificate signed by Everett Goodwin, Chief Financial Officer for IHC. (Def. Ex. 211.) Paragraph 5 of the 1996 Landlord Consent and Estoppel Certificate states:

> Under the Lease, the Tenant is obligated to pay rent currently at the rate of NINE THOUSAND FIVE HUNDRED SIXTY TWO DOLLARS AND 50/XX CENTS ($9,562.50) per annum. Rent has been paid through and including February 28, 1996. Under Section 1.3(b) of the Lease, the rent shall be adjusted on the next rent adjustment date, March 1, 1998.

(*Id.*) Paragraph 5 of the 1996 Landlord Consent and Estoppel Certificate contains two items that are of note: (1) it clearly states the annual rent to be paid under the Ground Lease, affirming that the rent had not been adjusted in the years since 1983 and (2) it provides that rent shall be adjusted in March 1998. (*Id.*) Because the rent remained static in 1996, the parties agreed that the fair market value was $15,000.00/acre. According to the language of paragraph 1.3(b), this agreement should have been taken into account when deciding subsequent rent adjustments. (Pl. Ex. 101.) The district court did not take the transaction into account in its findings.

Additionally, the 2001 transaction contains different terms than the 1996 transaction because it constitued a significant restructuring of the parties and the agreements. (Trial Tr. Vol. I, 153:8-11.) Sterling sold the building to Forrest Preston. (*Id.*, 153:12-21.) Quail Ridge assumed the Ground Lease. (*Id.*, 155:9-16.) The parties amended the sublease between Sterling and PMI. Quail Ridge could become the sublessor with PMI remaining as the sublessee. (*Id.*,

155:9-16.) Sterling took itself completely out of the picture in 2001 creating a new agreement between the parties.

IHC, PMC's predecessor, remained a vital party to the transaction. IHC continued to own the real property where the Quail Ridge building is located. Attorney Guy Kroesche represented IHC during the 2001 transaction. (*Id.*, 156:9-11.) Kroesche received copies of every document associated with the 2001 transaction. (R Vol. II, p. 291.) Kroesche and Faulkner negotiated over the substance of the transactional documents, including the 2001 Landlord Consent and Estoppel Certificate. (*Id.*)

Many of the changes suggested by Kroesche were "crafted towards rewriting the existing agreements." (R Vol. II, p. 291.) As counsel for IHC, Kroesche received all of the restructure documents and commented on many of them. (Trial Tr. Vol. II, 164:8-17; Def. Ex. 228). Importantly, Kroesche edited the 2001 Landlord Consent and Estoppel Certificate and added, for instance, terms that required a payment guarantee of the Ground Lease. (*See id.*, 164:13-23; Def. Ex. 228.) There is no dispute whether Kroesche recommended changes to the estoppel certificate and that many of his suggestions were incorporated into the final version. Kroesche's involvement in the 2001 restructure demonstrates that the terms of the 2001 Landlord Consent and Estoppel Certificate were negotiated at arms-length.

New terms were added to the parties' relationship in 2001. For instance, Forrest Preston was to sign a personal guarantee as a part of the 2001 transaction. (Trial Tr. Vol. II, 164:22-23.) The personal guarantee constituted a new, additional term for the 2001 transaction. (*Id.*, 165:19-21.) The parties made other changes. Thus, the 2001 transaction created a new arrangement

among all of the remaining parties.

The 2001 Landlord Consent and Estoppel Certificate is substantively different than its 1996 counterpart. In the 2001 version, paragraph 5 omits the statement that rent would be adjusted on the next rent adjustment date. (Def. Ex. 228, ¶ 5.) Faulkner, Quail Ridge's corporate representative during trial, explained the change during his testimony at trial. He testified:

> Because I had looked at what the parties had been doing since 1996, and for the five years that our group had been involved in the facility the rent adjustment mechanism had never been raised. And then I spoke with the folks from Sterling Development Group and understood that in the entire 13 years preceding our involvement no one had ever raised the section of the rent adjustment in order to increase or change the rent. So I wanted to confirm in the course of dealing that it had been waived.

(Trial Tr. Vol. II, 166:7-17.) Faulkner testified that Quail Ridge:

> [W]anted to put to bed once and for all what the rent was going to be. So in Mr. Preston agreeing to personally guarantee the lease, he wanted to know what the rent was. This served to confirm what the course of dealing had been for all that many years before this.

(*Id.*, 170:8-16.) IHC never objected to the substantive change in paragraph 5. (*Id.*, 170:21-24.) Kroesche reviewed the substance of the 2001 Landlord Consent and Estoppel Certificate and Everett Goodwin signed the document on IHC's behalf. (Def. Ex. 228.)

The 2001 Landlord Consent and Estoppel Certificate modifies paragraph 1.3(b) of the Ground Lease. The 2001 Landlord Consent and Estoppel Certificate evidences mutual assent or acquiescence to the elimination of the rent adjustment provision found in 1.3(b). The district court's finding that "the *only* evidence in the record regarding the modification of the Lease Agreement is the subjective intent of Faulkner" stands in stark relief next to the substance of the 2001 Landlord Consent and Estoppel Certificate which is an express, written modification of the parties' lease arrangement and the fact that additional terms were added to the parties'

arrangement. (R Vol. I, p. 197, emphasis added.) The additional requirement of a personal guarantee of Preston demostrates that this significant modification of the lease was supported by additional consideration. The district court's finding ignores the totality of the admitted evidence, which leads to only one reasonable conclusion: that the parties' expressly fixed the rent amount at the historical per annum amount and, in consideration thereof, the CEO of Quail Ridge personally guaranteed the lease payments for the duration of the lease.

Idaho law allows course of conduct or written agreements to constitute a modification of a preexisting contract. *Watkins Co., LLC*, 272 P.3d at 508. The 2001 Landlord Consent and Estoppel Certificate evidences mutual assent to a new written agreement. The certificate contains terms that are substantively different from the Ground Lease. The document plainly provides for fixed rent starting in 2001. (Def. Ex. 228.) All of the parties signed the 2001 Landlord Consent and Estoppel Certificate. The district court, therefore, erred when it concluded that the only evidence supporting modification was Faulkner's subjective intent because the document itself was evidence of the modification.

Quail Ridge recognizes that the following language also appears in the 2001 Landlord Consent and Estoppel Certificate:

> Landlord's consent to the assignment and assumption and/or to the sublease as set forth herein shall not constitute or be construed as (a) an acknowledgement or consent to any other assignment, assumption and/or sublease, (b) a waiver or modification by Landlord of the Tenant's duties or obligations under the Lease, or excuse Tenant's performance of any terms or condition of the Lease, and/or (c) a waiver or modification by Landlord of any of its rights under the Lease, including without limitation Landlord's rights pursuant to Section 12.1 of the Lease.

(Def. Ex. 228.) This language is not dispositive of the modification issue. Instead of finding this

language dispositive, the district court should have looked at how the parties behaved following the 2001 transaction to determine the parties' intent. *Watkins Co., LLC*, 272 P.3d at 508. During the years immediately following the 2001 transaction, IHC acted in a manner consistent with modification. It never sought to adjust rent. PMC, when it assumed IHC's position in 2002, never sought to adjust the rent until 2009. The district court failed to analyze the subsequent conduct of the parties in light of the 2001 Landlord Consent and Estoppel Certificate's terms.

Faulkner testified that the change to paragraph 5 was intended to accomplish a modification of the original Ground Lease. (Trial Tr. Vol. II, 166:7-17; 170:8-16.) PMC failed to refute Faulkner's testimony. Had PMC done so, the district court would have cited and relied on that testimony. It did not. (R Vol. I, p. 197, ¶ 35.) Faulkner's intent to modify the 2001 Landlord Consent and Estoppel Certificate is not the type of "subjective intent" discussed in *Beus v. Beus*, 254 P.3d 1231 (Idaho 2011), the case relied upon by the district court. This case is distinct because the document fully disclosed the intent to Kroesche and IHC. Faulkner left out the adjustment language from paragraph 5, submitted it to Kroesche for additional changes and received none. The parties ultimately agreed to the terms as set forth in Defendant's Exhibit 228 and negotiated at arms-length.

The district court improperly criticized and dismissed Faulkner's testimony in paragraph 35 of its Findings of Fact and Conclusions of Law. The district court wrote that "removing language that was present in an earlier document and not discussing the same or making the other party aware of its deletion does not establish 'mutual assent.'" (R Vol. I, p. 197.) However, the district court cites no evidence for its conclusion that Quail Ridge had somehow

hoodwinked IHC. The district court never refers to Kroesche's deposition testimony that would substantiate such a conclusion. The district court similarly does not cite any IHC or PMC officer testimony about the issue. The district court ignores what it had in front of it: the 2001 Landlord Consent and Estoppel Certificate, Faulkner's testimony, and the parties' conduct following the 2001 transaction.

Thus, the evidence does not support the district court's findings and conclusions. The district court misapplied the law governing modification. It als failed to properly apply the law that requires district courts to have "substantial evidence" to support findings and conclusions in order for them to be upheld on appeal. *Clayson v. Zebe*, 280 P.3d 731, 735 (Idaho 2012). The district court, in this case, ignored the guidance of *Clayson* and erred when it failed to to rule that the Ground Lease had been modified and the rent adjustment provision changd. In essence, the district court exercised its powers solely to restore PMC to "rights that they have, for a consideration, deliberately, or even negligently, waived." *Travers v. Stevens*, 145 So. 851, 855 (Fla. 1933). The district court should be reversed and the matter remanded.

C. The district court erred by failing to find waiver.

The evidence also established that PMC waived its right to adjust rent. PMC never invoked the rent adjustment provision prior to the filing the lawsuit. IHC had never exercised the rent adjustment clause. PMC did not invoke the clause in the wake of it stepping in for IHC. The failure to act and adjust the rent constitutes a course of conduct that the district court should have relied upon to find waiver.

"A clear intention to waive must be shown before waiver shall be established." *Knipe*

Land Co. v. Robertson, 259 P.3d 595, 604 (Idaho 2011). "Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." *Id.* at 604. For waiver to be found the court must find whether the facts alleged to constitute waiver are true. The court must also decide whether, if true, these facts suffice as a matter of law to show waiver. *Id.* Waiver may be evidenced by conduct, word, or acquiescence. *Everton v. Blair*, 576 P.2d 585, 587 (Idaho 1978).

The Idaho Court of Appeals recognized that the failure to act could waive certain legal rights. In the criminal context, for example, the failure to request appropriate jury instructions would waive the associated defenses a criminal defendant may otherwise have been able to assert. *State v. Peregrina*, 2010 Ida. LEXIS 21 *7 (March 24, 2010). In yet another example, in appellate practice, if a party fails to support a position with argument and authority in the opening brief then it waives those issues. *Ball v. City of Blackfoot*, 273 P.3d 1266, 1271 (Idaho March 23, 2012). In *Maclay v. Idaho Real Estate Commission*, 2012 Ida. LEXIS 35 (Idaho January 26, 2012), the Court declined to hear arguments that were not supported by argument or authority in the opening brief. *Id.* at *24-25 (citing *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006)); *see also State v. Grantham*, 146 Idaho 490, 500, 198 P.3d 128, 138 (Ct. App. 2008). The logic of these holdings appears to be that a party's failure to act constitutes a course of conduct demonstrating waiver.

The situation is no different for parties waiving contractual rights. If a party possesses a particular right under a contract and fails to assert that right, then the failure to assert the right is a course of conduct. As noted, *supra*, the evidence supporting waiver is undisputed. No party

ever tried to adjust the rent before 2001 or in the years immediately following the 2001 transaction. PMC conducted itself in a manner consistent with waiving the right to adjust rent under the Ground Lease. Quail Ridge relied on PMC's failure to act and paid down debt on the Quail Ridge building because it believed that the rent had been changed from an adjustable amount to a fixed amount. (*Id.*, 171:20-172:4, 11-20; 174:2-7.) Quail Ridge detrimentally relied on PMC's conduct vis-à-vis the rent adjustment provision. Detrimental reliance may establish waiver. *Clearwater Minerals Corp. v. Presnell*, 729 P.2d 420, 425 (Idaho Ct. App. 1986). In its discussion of waiver, the district court never considers Quail Ridge's reliance on the failure to adjust the rent by PMC or its predecessor, IHC. (R Vol. I, pp. 198-99.) Again, the district court ignored the evidence that it had before it in order to fashion a remedy and result that it desired rather than one supported by the evidence.

PMC acquiesced to the rent being fixed at $9,562.50 per annum. It never sought to adjust the rent before the 2001 transaction and it never sought to adjust the rent in the years immediately following 2001. The course of conduct between the parties evidences waiver and the district court erred by failing to find a waiver in this case.

D. The district court erred by not applying estoppel to bar PMC's claim.

The district court erred by not finding that PMC was estopped from claiming that it was owed rent other than the amount set forth in the 2001 Landlord Consent and Estoppel Certificate. The representations made by PMC in the estoppel certificate should have been binding on PMC and the district court erred by allowing PMC to assert claims that contradicted the plain language of the estoppel certificate.

The fundamental role of estoppel certificates is to make binding representations for a party in order for other parties to make informed, reasonable decisions. *K's Merch. Mart, Inc. v. Northgate Ltd. P'ship*, 835 N.E.2d 965, 971 (Ill. 2005). "A party who executes an estoppel certificate should not be allowed to raise claims of which it knew or should have known at the time the certificate was executed." *K's Merch. Mart, Inc.*, 835 N.E.2d at 972. "An estoppel certificate binds the signatory to the statements made and estops that party from claiming to the contrary at a later time." *Plaza Freeway Ltd. P'ship v. First Mountain Bank*, 81 Cal. App. 4th 616, 626, 96 Cal. Rptr.2d 865, 872 (2000).

Here, IHC represented that the rent due under the Ground Lease Agreement was $9,562.50 per annum. (Def. Ex. 228, ¶ 5.) Quail Ridge, Sterling, PERSI, PMI, and IHC all signed the document. (*Id.*) The representation contained in paragraph 5 does not contemplate a future adjustment to the rent. (*Id.*) The 1996 estoppel certificate contains fundamentally different language than the 2001 version insofar as it expressly contemplates adjusting the rent during the subsequent adjustment period. (*Id.*; *see also* Def. Ex. 211.) The district court erred by allowing PMC to seek a declaration of its rights related to adjusted rent when PMC made specific representations about the rent owed under the Ground Lease Agreement in the 2001 Landlord Consent and Estoppel Certificate. The district court should have bound PMC to its representations and dismissed the claim for adjusted rent. The district court erred by failing to apply the law governing estoppel certificates and the district court should be reversed.

E. The district court erred by disregarding the Ground Lease's language.

Quail Ridge asserts that the issues of modification, waiver, and estoppel are dispositive and should result in PMC's claim being dismissed. However, if the Court disagrees, Quail Ridge submits that the district court erred when it interpreted the Ground Lease's terms. The district court's findings that Quail Ridge owed PMC adjusted rent for 2010-12 in the total amount of $445,000.00 is based on an improper reading of the Ground Lease. The district court misunderstood, or entirely missed, the point of the Ground Lease language and failed to correctly interpret the contract consistent with the evidence and the law.

The issue tried to the district court, at its core, was one of contract interpretation. Idaho's case law controlling contract interpretation cases is not complex. The law provides that courts should begin with the document language when analyzing or interpreting a contract. *Potlach Educ. Ass'n v. Potlach Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). Courts should "seek to give effect to the intention of the parties." *Clear Lakes Trout Co., Inc. v. Clear Springs Foods, Inc.*, 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). "To determine the intent of the parties, the contract must be viewed as a whole and in its entirety." *Id.*

> When interpreting a contract, this Court begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.

Knipe Land Co. v. Robertson, 151 Idaho 449, 454-55, 259 P.3d 595, 600-01 (2011).

A fundamental rule of contract interpretation is that the court should not rewrite the parties' contract. The Court has held that courts lack "the roving power to rewrite contracts." *City of Meridian v. Petra, Inc.*, 2013 Id. LEXIS 98, *17 (April 1, 2013) (citing *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 362, 93 P.3d 685, 693 (2004)). In *McCallum v. Campbell-Simpson Motor Co.*, 82 Idaho 160, 349 P.2d 986 (1960), the Court wrote:

> We must construe the contract according to the plain language used by the parties. While a court may interpret agreements voluntarily entered into, a court cannot modify an agreement to as to create a new and different one, nor is the court at liberty to revise an agreement where its interpretation is involved. Courts cannot make for the parties better agreements than they themselves have been satisfied to make, and by a process of interpretation relieve one of the parties from the terms which he voluntarily consented to; nor can courts interpret an agreement to mean something the contract does not itself contain.

Id. at 166, 349 P.2d at 990. The Idaho Supreme Court has consistently applied this rule. In the context of arbitration, the Court has held that "arbitrators are, of course, not free to disregard the terms of the contracts they are reviewing—their powers derive from the parties' agreement." *Storey Constr. Inc. v. Hanks*, 148 Idaho 401, 409, 224 P.3d 468, 476 (2009).[2]

Here, the district court focused on paragraph 1.3(b) of the Ground Lease. Paragraph 1.3(b) contained the terms related to rent adjustment. PMC initially sued Quail Ridge for breach of contract and argued that PMC was entitled to an increased rent based on that paragraph. (R Vol. I, p. 1-51.) The district court dismissed the breach of contract claim after PMC rested its case. (*Id.*, p. 129.) Once the breach of contract claim had been dismissed PMC only had a claim

[2] The context of arbitration is especially appropriate since the district court essentially acted as the arbitrator of the dispute as required by Section 13 of the Ground Lease Agreement.

for declaratory relief. (*Id.*, pp. 101-04.) Section 1.3(b) of the Ground Lease Agreement provides:

> Adjustment Based on Property Value. The annual net rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date.
>
> The parties' written agreement within ninety (90) days before the applicable rent adjustment date shall a conclusive determination between the parties of the fair market value for the period to which the adjustment applies. If the parties have not so agreed by the applicable rent adjustment date, the determination shall be made as in the paragraph on Arbitration in Article 13.
>
> The rent adjusted shall be equal to fifteen percent (15%) percent (sic) of the fair market value of the leased land, exclusive of improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.
>
> If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rent is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.

(Pl. Ex. 101.) The Court found that the some of this language ambiguous. (R Vol. I, pp. 62-63; Hr'g Tr. 4:1-13:18, March 26, 2012.) Specifically, the Court found the following portion of Section 1.3(b) ambiguous:

> The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.

(Hr'g Tr. 8:14-9:13, March 26, 2012). A finding that the language was ambiguous, however, does not mean that it is not helpful to understanding the contract or that the district court should just ignore the language when interpreting the contract document.

The district court concluded that it should disregard or ignore certain language in the Ground Lease Agreement. That decision was wrong. Specifically, the district court wrote:

> (26) The Court will give no weight to the language contained in the Lease Agreement that when adjusting the rent 'the determination shall take into account the parties' agreement that the initial minimum rent is above-the stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre.' The reason the Court will give no weight to this language is that there has been no credible evidence which this Court accepts concerning whether this $15,000.00 per acre figure was the result of a market analysis conducted by the parties in 1983, or whether it was a figure higher or lower than market value as discussed in the Court's Conclusion of Law number 21.
>
> (27) Likewise, the Court concludes that there is no course of dealings between the parties to assist the Court in determining what construction the parties placed upon this provision of the Lease Agreement by observing and construing their conduct or dealings. The crux of the matter is that there was no course of dealing for the following reasons (1) Sterling, and later Quail Ridge, had no incentive to seek a rent adjustment (in a manner of speaking if Sterling or Quail Ridge 'rocked the boat' they had nothing to gain and only increased rent to lose if they initiated a rent adjustment under the Lease Agreement); (2) IHC and Bannock County, through poor management and/or having forgotten about the rent adjustment provision, never sought a rent adjustment. [footnote omitted]
>
> (28) Therefore: (1) because there is no evidence to establish how the original fifteen thousand dollar per acre figure was reached; and (2) because there is no evidence to establish a course of dealing to establish what construction the parties intended to give to the language related to subsequent adjustments, the Court will disregard these provisions of the [Ground Lease].

(R Vol. I, p. 195.) The act of ignoring, giving no weight to contract terms, or disregarding the contract language, necessarily creates a new contract with new terms. The creation of a new contract is not the goal of contract interpretation. *See Shawver v. Huckleberry Estates, LLC*, 140

Idaho 354, 362, 93 P.3d 685, 693 (2004). The district court should have interpreted the contract language without fashioning a new agreement. *Id.*

The district court reasoned that since no parole evidence was admitted during trial about the terms it found ambiguous that it could not interpret the contract as written. That rationale is inherently flawed and entirely misses the point. The issue in the case was not "how" the parties initially reached the $15,000.00 figure. The process for deciding the original value given to the real property does not matter when adjusting the rent. The fact that IHC and Sterling originally agreed on the $15,000.00/acre value is relevant; how they reached that figure ultimately does not matter. The Ground Lease clearly contemplated subsequent adjustments in rent "taking into account" the original, agreed upon figure. The $15,000.00/acre figure, by the document's own terms, has to be factored into subsequent adjustments of the rent in some manner. (Pl. Ex. 101.) The district court did not take those facts into account and therefore misapplied the law to the document. The district court's improper application of law and fact resulted in its incorrect findings because contract intent is to be derived based on the contract language as a whole. *J.R. Simplot v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006); *Gem-Valley Ranches v. Small*, 90 Idaho 354, 372, 411 P.2d 943, 954 (1966).

The existence or absence of extrinsic evidence does not justify willfully disregarding contract language. Instead, the district court should have factored in the "taking into account" language rather than just ignoring it or giving it no weight. The district court rewrote the parties' agreement when it should not have done so. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 362, 93 P.3d 685, 693 (2004).

Taking into account the original $15,000.00/acre agreement and the fact that there were no subsequent adjustments to the rent results in a vastly different adjustment to the rent than the one created *ex nihilo* by the district court. Any adjustment to rent based on the actual language of 1.3(b) would be based on the incremental change in land values for the adjustment periods at issue in this case. Applying the incremental change, regardless of whether it is an increase or decrease in land value, takes into account the prior agreements as to value and rent.

The district court only awarded adjusted rent for 2010. The two experts in the case both testified that land values decreased from 2007 to 2010. (Trial Tr. Vol. I, 62:11-65:2; Vol. II, 202:2-7.) Janoush testified that the decrease in land values from 2007 to 2010 was -8.33%. (*Id.* Vol. I, 64:11-18.) The adjustment of rent, if the any, should have factored in the incremental, relative change in land values of -8.33% as applied to the $15,000.00/acre value. This would have reduced the rent owed by Quail Ridge to PMC.

The justification for this interpretation is firmly based in the Ground Lease's language. The Ground Lease mandates that the prior value be taken into consideration. (Pl. Ex. 101.) The Ground Lease does not, significantly, require an objective market value for the property. (*Id.*) Such an "objective" market value for the real property fails to take into account the Ground Lease's language. For over thirty years, the parties and their predecessors stipulated, acquiesced, or otherwise agreed that the land value for prior adjustment periods was $15,000.00/acre. The parties did this through various economic upswings and downturns. That course of conduct should have been taken into account by the district court when adjusting the rent. It chose not to do so but by making that choice it reached a result not even remotely based on the actual

language of the contract. Such a finding by the district court should be reversed by this Court and remanded for a proper interpretation of the Ground Lease.

F. The district court erred by not finding a course of dealing.

The district court expressly found the absence of a course of conduct that would have been relevant to the determination of any adjusted rent. However, the district court's conclusion could only be reached by (a) ignoring or minimizing certain pieces of evidence and (b) by ignoring certain terms in the Ground Lease.

Parties' course of dealing is relevant to determining intent when interpreting contract terms. *J.R. Simplot v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006). The district court had before it evidence in the form of deposition testimony establishing IHC's mentality about how the terms of 1.3(b) were to be carried out. From 1989 to 2000, there was a conscious decision by IHC to not adjust the rent. (R Vol. II, pp. 309-10, Christison Dep. 10:1-11:3; 12:24-13:4.) The conscious decision to leave the rent at $9,562.50 was a course of conduct by IHC that should have bound PMC. At the very least IHC's conscious, deliberate choice to leave the rent where it was at in 1983 should have been "taken into account" when deciding any rent adjustments. The district court did not factor in IHC and Sterling's course of dealings and instead elected to ignore it because PMC, when it stepped into IHC's shoes, failed to adjust rent or otherwise pay attention to the Ground Lease. However, just because PMC negligently managed its contracts does not mean that the prior, voluntary choices by IHC to not adjust rent fails to be relevant when adjusting rent under the Ground Lease. Paragraph 1.3(b) requires that the prior adjustments of rent be "taken into account" and the district court admittedly did not take

into account IHC's conscious choices in this regard. (R. Vol. I, p. 195; footnote 20.)

The failure to take into account the past actions by IHC and PMC was an error by the district court. Its finding that there was no course of dealing in this case is not supported by substantial evidence; indeed, there is no evidence supporting the district court's conclusions.

G. The district court erred by admitting Brad Janoush's testimony.

1. Standard of Review

District court decisions related to the admission of expert testimony are reviewed for an abuse of discretion. *Karlson v. Harris*, 140 Idaho 561, 97 P.3d 428, 431 (2004). "In reviewing whether or not a district court abused its discretion this Court determines: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Kirk v. Ford Motor Co.*, 116 P.3d 27, 30-31 (Idaho 2005).

2. Argument

The district court relied on the testimony of PMC's expert witness, Brad Janoush (Janoush) for reaching its conclusion about the amount of rent owed by Quail Ridge to PMC for the 2010 rent adjustment period. Quail Ridge moved to strike Janoush's testimony from the record and the district court denied that motion. (R Vol. I, p. 129.) The district court abused its discretion because it did not act within the outer boundaries of its discretion and within the applicable legal standard. The district court also failed to reach its decision by an exercise of reason.

The admissibility of expert testimony is committed to the discretion of the trial court. *Weeks v. E. Idaho Health Servs.*, 153 P.3d 1180, 1183 (Idaho 2011). The test for admissibility is Rule 702 of the Idaho Rules of Evidence. *Id.* Idaho Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

IDAHO R. EVID. 702 (2012). Rule 703 of the Idaho Rules of Evidence is as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

IDAHO R. EVID. 703. "Expert opinion which is speculative, conclusory, or unsubstantiated by the facts in the record is of no assistance to the jury in rendering its verdict and, therefore, is inadmissible as evidence." *Weeks*, 153 P.3d at 1184. When analyzing the admissibility of an expert's proposed testimony, the focus of the court's inquiry must be on the "principles and methodology" used and not the conclusions generated. *Id.*

Here, the district court admitted Janoush's testimony despite Janoush's suspect methodology and his failure to consider the terms of the Ground Lease. Quail Ridge objected to Janoush's opinions as to value during trial. (Trial Tr. Vol. I, 52:18-22; 60:12-20; 61:7-16.) Janoush testified that he had never reviewed the terms of the Ground Lease prior to performing his appraisal. (Trial Tr. Vol. I, 63:10-15.) The Ground Lease sets forth how the parties should

subsequently decide the value of the property. (Pl. Ex. 101.) It requires the parties to "take into account" the original value of $15,000.00 and subsequent determinations of market value. By acknowledging he did not review the Ground Lease or its terms, Janoush could not have "taken into account" either of those factors when coming up with his values that would be relevant to the adjustments of rent. Janoush did not employ a proper methodology to the case. His opinion that the land values were $990,000 for the 4.25 acre parcel was not tied to the Ground Lease at all. Janoush's opinions lacked foundation and were not relevant.

Admission of Janoush's opinions clearly impacted the outcome in this matter. The district court relied on Janoush's opinions when deciding the adjusted rent. (R Vol. I, pp. 191-92.) However, Janoush applied a flawed methodology and lacked the requisite foundation to testify about how the rent should be adjusted in this case.

In reliance on Janoush's testimony, the district court incorrectly calculated the adjusted rent based on the current land values. The district court ignored the Ground Lease requirements to take into account (a) prior agreements regarding adjustments and (b) the initial value being set at $15,000.00/acre. The district court's ignored the contractual language and should be reversed.

IV. CONCLUSION AND RELIEF REQUESTED

As a result of the foregoing, the district court should be reversed and remanded.

Dated: May 7, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendant/Appellant

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on May 7, 2013, I served true and correct copies of the APPELLANT BRIEF on the following by the method of delivery designated below:

Kent L. Hawkins
R. William Hancock
Merrill & Merrill
109 N. Arthur, 5th Floor
PO Box 991
Pocatello, ID 83204-0991

☑ FedEx ☐ Hand-delivered ☐ Facsimile

Idaho Supreme Court
451 W. State Street
Boise, ID 83720

☑ FedEx ☐ Hand-delivered ☐ Facsimile

Michael D. Gaffney
John M. Ayondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendant/Appellant

FILED
BANNOCK COUNTY, IDAHO
2013 OCT 15 PM 1:57
DEPUTY CLERK

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Pursuant to I.R.C.P. 56(c), the Plaintiff submits the following as its Reply in Support of its Motion for Summary Judgment:

ARGUMENT

With respect to Quail Ridge Medical Investors, LLC, and Forrest L. Preston's (collectively "Quail Ridge") Arguments I, II, and III, respectively, in its Opposition to PMC's Motion for Summary Judgment, Plaintiff, Pocatello Hospital, LLC c/b/a Portneuf Medical Center, LLC ("PMC), notes that these arguments are identical to the arguments made by Quail Ridge in its Cross-Motion for Summary Judgment. PMC has already thoroughly addressed these arguments within its Opposition to Quail Ridge's Cross-Motion for Summary Judgment and, therefore, PMC simply adopts and reiterates its brief in opposition to Quail Ridge's Cross-Motion for Summary

Judgment as if it had been fully set forth herein. PMC is content to rely upon those earlier arguments for support of the fact that it is entitled to bring its present breach of contract action against Defendants.

To the extent, however, that Quail Ridge has raised several new arguments in its Opposition to PMC's Motion for Summary, PMC will address the same. Specifically, Quail Ridge argues: (1) The phrase "promptly pay" is ambiguous; and (2) The issue of "promptly pay" is not ripe for adjudication; and (3) Quail Ridge is not collaterally estopped from bringing *all* of its affirmative defenses.

I. The contract term "promptly pay" is not ambiguous.

As an initial matter, this Court should recognize that the requirement to "promptly pay" is a term of the 1983 Ground Lease Agreement that governs the rights and responsibilities of PMC and Quail Ridge. Indeed, in his *Order on Form of Judgment*,[1] Judge Brown succinctly found that:

> The parties' Ground Lease Agreement provides that 'the party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.' Ground Lease Agreement, p. 3, § 1.3(b). Now that the determination has been made as contemplated under the Ground Lease Agreement, the Ground Lease Agreement required "prompt" payment of the balance due under the Ground Lease Agreement.

See Order on Form of Judgment (Avondet Aff., Ex. F, p. 3). Thus, while Judge Brown's Amended Declaratory Judgment states that Quail Ridge was to "promptly pay" the amount identified in the Amended Declaratory Judgment, this Court should recognize that all that Judge Brown was really doing by the language was simply giving respect the contractual term that required such prompt payment. PMC's Motion for Summary Judgment is based upon the breach of this clear and unambiguous contractual term and not upon a violation of Judge Brown's Amended Declaratory Judgment.

Because Quail Ridge has cited with approval to the Idaho Supreme Court's decision in *Potlach Educ. Ass'n v. Potlach School Dist. No. 285*, 148 Idaho 630, 226 P.3d 1277 (2010), PMC will use that opinion to outline the legal parameters of the issues currently before the Court. In *Potlach*, the Idaho Supreme Court summarized the process of contract interpretation in Idaho as

[1] Attached as Exhibit F to Affidavit of John M. Avondet in Support of Defendant's Cross-Motion for Summary Judgment.

follows:

> When interpreting a contract, this Court begins with the document's language. 'In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.' Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. ***Whether a contract is ambiguous is a question of law***, but interpreting an ambiguous term is an issue of fact.

Potlach, 148 Idaho at 633, 226 P.3d at 1280 (citations omitted) (emphasis added).

The issue of whether the "promptly pay" term of the 1983 Ground Lease Agreement is ambiguous is a question of law for this Court. In this case, Quail Ridge argues that this term is ambiguous, but gives no basis therefore. Certainly Quail Ridge has not argued that the language at issue is "nonsensical." To the extent that Quail Ridge may be trying to rely upon *Potlach* to argue that this phrase is ambiguous because it subject to "two different reasonable interpretations," this argument fails. A complete review of the majority opinion in *Potlach* demonstrates that the mere fact that parties to a contract may disagree as to the meaning of a contract term does not, in itself, make a term ambiguous. Indeed, the parties to the "Master Agreement" at issue in *Potlach* had different interpretations of what was meant by the phrase "professional leave" as used within that document. Despite these reasonable differences in interpretation of the phrase "professional leave," the majority of the Idaho Supreme Court in *Potlach* found no difficulty with interpreting the contract, including the phrase "professional leave," and determining that the School District had not violated the contract, as a matter of law.

That this Court should interpret this contract term as a matter of law is even stronger in this case than in *Potlach*. Here, PMC is in agreement with Quail Ridge that the words in the phrase "promptly pay" should be construed in their plain and ordinary meaning. Further, Quail Ridge concedes in this case that "there is no dispute that the amount identified by Judge Brown has not been paid by Quail Ridge." Finally, PMC does not dispute that Quail Ridge is disputing Judge Brown's Amended Declaratory Judgment. Thus, there are no genuine issues of material fact in this case.

Because there are no genuine issues of material fact in this case, this Court is entitled to enter summary judgment by giving the phrase "promptly pay" its plain and ordinary meaning and

thereafter determining, as a matter of law, whether Quail Ridge failed to promptly pay under the undisputed facts of this case. Quail Ridge acknowledges within its opposition that promptly means "ready and quick to act as occasion demands."[2] In this case, the Court should find that once a determination of adjusted rents had been made for the 2010 rent adjustment period, the 1983 Ground Lease Agreement demanded that Quail Ridge be ready and quick to act and make payment in the amount declared by Judge Brown to then be currently due and owing.

II. This Issue is Now Ripe for Determination

It seems disingenuous, at best, for Quail Ridge to complain at this point that this matter should be stayed pending a ruling by the Court in *PMC I*. This Court should recall that it gave Defendants two separate opportunities to stay this action by depositing the necessary funds into the Court and Quail Ridge failed to comply with the Court's order on both occasions. Indeed, it was only *after* Quail Ridge failed to deposit the necessary funds the second time, that this matter was allowed to proceed and PMC filed its Motion for Summary Judgment.

Further, Quail Ridge misses the mark in arguing that the Court misinterpreted the rules in ordering a bond as a requirement for this stay. Quail Ridge argues that no bond was necessary because this was not the stay of a money judgment under I.R.C.P. 62(b). In so arguing, Quail Ridge fails to recognize the rule under which PMC requested a bond in the first place. PMC did not request a bond pursuant to I.R.C.P. 62(b), but rather requested a bond pursuant to I.R.C.P. 62(d) and I.A.R. 13(b)(14)-(15). These rules provided this Court with broad discretion to require that a supersedaes bond be posted during the pendency of the appeal in *PMC I*. Even though such bond was required by the Court, the Defendants ignored the Court's orders to post such bond on two occasion and now seek the Court to give it a third opportunity to stay this action pending appeal. Under the circumstances of the case, this Court should decline the offer and find that the issue before it his ripe for determination.

III. Defendants Are Barred from Bringing Their Affirmative Defenses

Quail Ridge's arguments in this regard seem most curious. Quail Ridge doesn't seem to dispute that Defendants should be barred from relitigating the affirmative defenses already raised and decided by Judge Brown, but rather seems to simply argue that Defendants have raised

---

[2] *See* Defendant's Memorandum in Opposition to Motion for Summary Judgment, at p. 11 (citing BLACK'S LAW DICTIONARY1379 (4TH Ed. 1968).

affirmative defenses in this action which were not raised in *PMC I*. Quail Ridge does not identify for the Court, however, those affirmative defenses which it claims to be new and valid in the instant case. PMC contends that Quail Ridge did not identify any such affirmative defenses because there is no factual basis in support of any alleged defenses and that the defenses which have been previously tried are the only otherwise valid affirmative defenses they may have had available.

Regardless, PMC invites this Court to review Judge Brown's Memorandum Decision and Order in comparison to Quail Ridge's Answer in this case. PMC feels confident that when the Court does so, the Court will find that the affirmative defenses raised by Quail Ridge in the present action are akin to the affirmative defenses raised by Quail Ridge in *PMC* I. PMC further feels confident that the Court will find that these defenses were tried before Judge Brown in an evidentiary trial and that Judge Brown has made a ruling upon each of the same, which ruling is now binding upon these Defendants.

For each of these reasons as well as the reasons outlined in PMC's Motion for Summary Judgment and Brief in Support of its Opposition to Quail Ridge's Cross-Motion for Summary Judgment, PMC respectfully requests this Court to enter summary judgment in this matter against these Defendants and enter a judgment in favor of PMC in the amount that Judge Brown has determined as currently due and owing for the 2010 Rent Adjustment Period.

DATED this 15th day of October, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiff in the above-referenced matter does hereby certify that a true, full and correct copy of the foregoing document was this 15th day of September, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney BEARD ST. CLAIR GAFFNEY PA 2105 Coronado Street Idaho Falls, Idaho 83404	[ ] U.S. Mail [ ] Hand Delivery [ ] Overnight Mail [X] Fax: (208) 529-9732
Honorable Robert E. Naftz 624 E. Center, Rm. 220 Pocatello, Idaho 83201 (Chambers Copy)	[ ] U.S. Mail [ ] Hand Delivery [ ] Overnight Delivery [X] Fax: (208) 236-7290

R. William Hancock, Jr.

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

2013 OCT 23 PM 2:14

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **JUDGMENT**

IT IS HEREBY ORDERED that summary judgment is granted in favor of the Plaintiff as follows:

1. Defendants are hereby ordered to pay, jointly and severally, unpaid current annual rent for the 2010 Rent Adjustment Period in a sum of $416,812.50;

2. Defendants are hereby ordered to pay interest on this amount from and after the date of the *Amended Declaratory Judgment*, November 26, 2012, at an annual rate of 12% until the date of entry of this Judgment. As of October 22, 2013, the total amount of interest owed is $45,221.30. Interest will continue to accrue in the amount of $137.03 per day thereafter until the date that this Judgment is entered.

3. Interest shall accrue on the entire judgment amount from the date of judgment forward at the post-judgment legal rate, which is currently 5.250% per annum.

DATED this 22 day of October, 2013.

Robert C. Naftz

Honorable Robert C. Naftz

CLERK'S CERTIFICATE OF SERVICE

The undersigned Clerk of Court, does hereby certify that a true, full and correct copy of the foregoing *Judgment* was this 22 day of October, 2013, served upon the following in the manner indicated below:

R. William Hancock
MERRILL & MERRILL, CHTD
P.O. Box 991
Pocatello, Idaho 83204-0991

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Telefax

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile

Deputy Clerk

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2018 NOV -6 PM 4:37
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **PLAINTIFF'S MOTION FOR COSTS AND ATTORNEY FEES**

COMES NOW the Plaintiff, Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC ("PMC"), by and through its counsel of record, Merrill & Merrill, Chtd., pursuant to I.R.C.P. 54(d), I.C. 12-121, and hereby moves this Court for an order granting PMC's requests for costs and attorney's fees as outlined in its Memorandum of Costs and Attorney's Fees filed contemporaneous herewith. With regard to PMC's request for attorney fees, PMC is specifically entitled to an award of attorney fees against the Defendant Quail Ridge Medical Investors, LLC, as matter of contractual right under Section 10.3 of the 1983 Ground Lease Agreement. This motion is based upon the Court's granting PMC its Motion for Summary Judgment, the judgment entered thereafter by this Court, and upon PMC's Memorandum of Costs filed contemporaneous herewith. Oral argument is not requested.

J. Nuffer

DATED this 6th day of November, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock, Jr.
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiff in the above-referenced matter does hereby certify that a true, full and correct copy of the foregoing document was this ____ day of September, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney BEARD ST. CLAIR GAFFNEY PA 2105 Coronado Street Idaho Falls, Idaho 83404	[X] U.S. Mail [ ] Hand Delivery [ ] Overnight Mail [X] Fax: (208) 529-9732
Honorable Robert E. Naftz 624 E. Center, Rm. 220 Pocatello, Idaho 83201 (Chambers Copy)	[ ] U.S. Mail [X] Hand Delivery [ ] Overnight Delivery [ ] Fax: (208) 236-7290

By _____
R. William Hancock, Jr.

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE DIST. CT.
2012 NOV -9 P 1:37
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **PLAINTIFF'S MEMORANDUM OF COSTS AND ATTORNEY FEES**

COSTS

Pursuant to IRCP 54(d), the Court's granting of Summary Judgment in favor of PMC and the judgment entered by the Court thereafter, Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC"), claims the following costs as the prevailing party to this action:

I. COSTS AS A MATTER OF RIGHT UNDER IRCP 54(d)(1)(C). The following are non-discretionary costs actually paid by PMC in bringing this action:

Filing Fee	$ 96.00

II. DISCRETIONARY COSTS SOUGHT UNDER IRCP 54(d)(1)(D). The following are discretionary costs which were necessary and exceptional costs reasonably incurred in bringing the Plaintiff's Motion for Summary Judgment and in defending the Defendant's Cross-Motion for Summary Judgment, which, in the

interests of justice, should be assessed against the Defendants.

Westlaw Research	$ 1,135.18
TOTAL COSTS REQUESTED PURSUANT TO IRCP 54(d)	$ 1,231.18

ATTORNEY FEES FOR BREACH OF CONTRACT

Pursuant to IC 12-121 and pursuant to paragraph 10.3 of the 1983 Ground Lease Agreement that governs the rights and responsibilities of the parties to this action, PMC claims the following attorney fees as the prevailing party to this action:

TOTAL ATTORNEY FEES	$ 15,797.00
TOTAL COSTS AND ATTORNEY FEES	**$ 17,028.18**

STATE OF IDAHO)
:ss
County of Bannock)

R. WILLIAM HANCOCK, JR., being first duly sworn, deposes and states:

1. I am one of the attorneys representing the Plaintiff, Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC"), and as such I have knowledge of the amounts of the costs and the circumstances to their being incurred.

2. I have reviewed the foregoing Memorandum of Costs and Attorneys Fees. The costs and attorney fees incurred therein are true and correct, were actually paid, and were reasonably and necessarily incurred in the prosecution of this action. To the best of my knowledge and belief, the costs and attorney fees shown herein are in compliance with the Idaho Rules of Civil Procedure.

3. Attached hereto as Exhibit A is a true and correct redacted copy of the Merrill & Merrill, Chtd. billing statement outlining the above-identified costs and attorney fees. The time entries shown on this billing statement are the time entries that were related to this action. All other time entries have been redacted, however, because they relate to other actions or matters that

are not relevant to this action.

4. Attached hereto as Exhibit B is a true and correct copy of the 1983 Ground Lease Agreement that governs the rights and responsibilities of these parties.

5. Section 10.3 of the 1983 Ground Lease Agreement states:

> *In the event suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant herein contained to be kept or performed, the prevailing party shall be paid a reasonable attorneys fee by the other party, and such attorney's fee shall be deemed to have accrued at the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.*

6. Judgment was entered against the Defendants in this matter because of a failure to pay rents due and owing under the Ground Lease Agreement.

R. William Hancock, Jr.

SUBSCRIBED AND SWORN TO before me this 6th day of November, 2013.

DEBORAH LAFANA
NOTARY PUBLIC
STATE OF IDAHO

Deborah Lafana
NOTARY PUBLIC FOR IDAHO
Residing at: Pocatello, ID
Commission Expires: 12-5-17

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiff in the above-referenced matter does hereby certify that a true, full and correct copy of the foregoing document was this 6th day of November, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney BEARD ST. CLAIR GAFFNEY PA 2105 Coronado Street Idaho Falls, Idaho 83404	[X] U.S. Mail [ ] Hand Delivery [ ] Overnight Mail [X] Fax: (208) 529-9732
Honorable Robert E. Naftz 624 E. Center, Rm. 220 Pocatello, Idaho 83201 (Chambers Copy)	[ ] U.S. Mail [X] Hand Delivery [ ] Overnight Delivery [ ] Fax: (208) 236-7290

By _____
R. William Hancock, Jr.

Client	Trans Date	Atty	H P	Tcode/ Task Co	Rate	Hours to Bill	Amount		Ref #
Client ID 13.59750 LHP Hospital Group, Inc.									
13.59750	12/04/2012	14	A	1	145.00	0.50	72.50	Finalize complaint; Attention to Appeal certification from District Court; Conference with Attorney Gallafent on Cross-Appeal.	ARCH
13.59750	12/10/2012	4	A	1	180.00	0.50	90.00	Review and edit Complaint, meet with Dave Gallafent, review clerk's certificate of appeal.	ARCH
13.59750	12/11/2012	1	A	21	180.00	0.50	90.00	Quail Ridge - Draft Complaint	ARCH
13.59750	12/11/2012	4	A	1	180.00	1.20	216.00	Edit Complaint on collection of rent, meet with Dave Gallafent.	ARCH
13.59750	12/12/2012	1	A	21	180.00	2.00	360.00	Quail Ridge - Draft Complaint	ARCH
13.59750	12/12/2012	4	A	1	180.00	1.10	198.00	Edit Complaint.	ARCH
13.59750	12/13/2012	1	A	21	180.00	0.50	90.00	Quail Ridge - Draft complaint; appraisal analysis	ARCH
13.59750	12/13/2012	14	A	1	145.00	0.40	58.00	Edit and revise Complaint for breach of contract claim; Conference with Attorney Gallafent	ARCH
13.59750	12/13/2012	4	A	1	180.00	1.30	234.00	Edit Complaint and Summons, meet with Bill and Dave, correspondence to Make Gaffney	ARCH
13.59750	12/13/2012	1	A	56			96.00	Bannock County Clerk - filing fee.	ARCH
13.59750	01/07/2013	14	A	1	145.00	0.30	43.50	Attention to Acceptance of Service; File Acceptance of Service with Court and cancel personal service	ARCH
13.59750	01/23/2013	14	A	1	145.00	0.30	43.50	Attention to Acceptance of Service and calendar deadlines; Conference with Attorney Gallafent regarding deadlines	ARCH

EXHIBIT

Client	Trans Date	Atty	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount		Ref #
Client ID 13.59750 LHP Hospital Group, Inc.									
13.59750	01/24/2013	4	A	1	170.00	0.20	34.00	Meet with Bill Hancock on default strategy, research on "notice of appearances".	ARCH
13.59750	01/24/2013	14	A	1	145.00	0.60	87.00	Research rules regarding Default Judgment and analyze whether notice required in this case; Conference with Attorney Hawkins on Notice issue	ARCH
13.59750	01/28/2013	4	A	1	170.00	0.10	17.00	Review Answer from Quail Ridge.	ARCH
13.59750	01/31/2013	1	A	21	170.00	0.25	42.50	Case preparation	ARCH
13.59750	01/31/2013	14	A	1	145.00	1.60	232.00	Conference with Attorney Gallafent on Summary Judgment in 2012 case and 2013 Rent Adjustment; Gather documents to begin next step in 2013 rent adjustment	ARCH
13.59750	02/04/2013	15	A	1	135.00	1.30	175.50	Research res iudicata.	ARCH
13.59750	02/05/2013	14	A	1	145.00	2.40	348.00	Legal research from *Motion for Summary Judgement* Conference with Attorney Neill on legal issues; Follow up legal research on collateral estoppel	ARCH
13.59750	02/05/2013	15	A	1	120.00	2.00	240.00	Discuss research with Bill Hancock; research collateral estoppel case law; draft legal argument for brief.	ARCH
13.59750	02/06/2013	14	A	1	145.00	6.20	899.00	Draft Motion for Summary Judgment	ARCH
13.59750	02/06/2013	15	A	1	120.00	0.20	24.00	Research collateral estoppel case law.	ARCH
13.59750	02/07/2013	1	A	21	170.00	0.50	85.00	Quail Ridge - Conference with Bill re: Quail Ridge Motion	ARCH
13.59750	02/07/2013	4	A	1	170.00	0.20	34.00	Review Motion to Stay Proceedings.	ARCH
13.59750	02/07/2013	14	A	1	145.00	3.40	493.00	Work on *Motion for Summary Judgement* Review and analyze Quail's Motion to Stay; Conference with Attorney Gallafent and Neill regarding rules on bond; Posting on stay of action.	ARCH
13.59750	02/07/2013	15	A	1	120.00	1.20	144.00	Research stays of proceeding and bond requirements.	ARCH
13.59750	02/11/2013	1	A	21	170.00	0.25	42.50	Quail Ridge - Review Quail Ridge Motion for stay relief	ARCH
13.59750	02/11/2013	14	A	1	145.00	1.50	217.50	Draft Reply to motion to Stay; Conference with Attorney Gallafent	ARCH
13.59750	02/12/2013	4	A	1	170.00	0.90	153.00	Prepare "Agreed Response to Court's Request for Scheduling Information", review Motion for Stay & research cases on stay of one suit based on appeal of another suit.	ARCH
13.59750	02/14/2013	4	A	1	170.00	0.30	51.00	Edit Agreed Response to court's request for information.	ARCH
13.59750	02/19/2013	1	A	21	170.00	0.25	42.50	Quail Ridge - Case preparation on 2nd suit	ARCH
13.59750	02/19/2013	4	A	1	170.00	0.20	34.00	Amended Agreed Response to Order for Submission of Information to court, correspondence.	ARCH
13.59750	02/19/2013	14	A	1	145.00	0.80	116.00	Revise and Redraft Reply to Motion to stay	ARCH
13.59750	02/20/2013	1	A	21	170.00	1.25	212.50	Quail Ridge - Case preparation; e-mail Joe	ARCH
13.59750	02/20/2013	4	A	1	170.00	1.30	221.00	Pleadings & hearing notice (motion & affidavit for stay), memo in support of motion to stay, research on stay rule, also research amount of bond required.	ARCH
13.59750	02/20/2013	14	A	1	145.00	2.20	319.00	Revise and edit Reply Memorandum; Conference with Attorney Hawkins; Draft additional arguments for opposition to Motion to Stay and change from "reply" to "opposition;" Conference with Attorney Gallafent; Revise and edit opposition	ARCH
13.59750	02/21/2013	1	A	21	170.00	0.50	85.00	Quail Ridge - Edit brief	ARCH
13.59750	02/21/2013	4	A	1	170.00	1.40	238.00	Edit stay memo, meet with Bill Hancock.	ARCH
13.59750	02/21/2013	14	A	1	145.00	3.20	464.00	Draft additional arguments in objection; Gather documentation and draft affidavits; Revise and edit objection; Conference with Attorney Hawkins; Conference with Attorney Gallafent; Revise Defendant's Answer to check admission of non-payment; Forward Wadle Affidavit to Dave.	ARCH

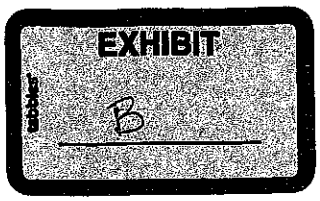
Client	Trans Date	Atty	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount		Ref #
Client ID 13.59750 LHP Hospital Group, Inc.									
13.59750	02/22/2013	1	A	21	170.00	0.25	42.50	Quail Ridge - Case preparation	ARCH
13.59750	02/22/2013	4	A	1	170.00	0.20	34.00	Affidavits and memo on motion to stay.	ARCH
13.59750	02/22/2013	14	A	1	145.00	0.70	101.50	Conference with Attorney Gallafent regarding issues with Reply; Draft changed to reply	ARCH
13.59750	02/25/2013	4	A	1	170.00	2.60	442.00	Meet with Bill, edit & finalize memo on Motion to Stay and to post a bond during appeal.	ARCH
13.59750	02/25/2013	14	A	1	145.00	1.20	174.00	Review and finalize objection; Conference with Attorney Hawkins	ARCH
13.59750	02/26/2013	4	A	1	170.00	0.10	17.00	Correspondence from Court on clerk's record.	ARCH
13.59750	02/28/2013	1	A	56			620.40	Westlaw research in February, 2013 (Bill Hancock).	ARCH
13.59750	02/28/2013	1	A	56			312.07	Westlaw research in February, 2013 (Tyler Neill).	ARCH
13.59750	03/01/2013	4	A	1	170.00	1.30	221.00	Review Quail's reply brief, and prepare for hearing on motion for stay.	ARCH
13.59750	03/02/2013	4	A	1	170.00	0.80	136.00	Prepare for hearing on Monday on Motion to Stay.	ARCH
13.59750	03/04/2013	4	A	1	170.00	3.70	629.00	Prepare for hearing on Motion to Stay.	ARCH
13.59750	03/04/2013	14	A	1	145.00	0.60	87.00	Review and analyze Quail Ridge's Reply Brief; Research Judge Brown's Minute Entry and Order for breach of contract issue; Conference with Attorney Hawkins	ARCH
13.59750	03/20/2013	4	A	1	170.00	2.30	391.00	Correspondence from Gaffney on posting cash with court instead of a bond, research on cash bond with court, continue review of record & transcripts, meet with dave Gallafent on bond & report to clients.	ARCH
13.59750	03/21/2013	1	A	21	170.00	0.50	85.00	Quail Ridge - Case analysis	ARCH
13.59750	03/22/2013	4	A	1	170.00	2.90	493.00	Edit correspondence to Gaffney, review strategy for raising rent and effect of stay order, follow up on cash/bond on stay order, call to administrative judge on bond procedure, finish transcript & record review, call to Cindy Haney, trial court administrator, e-mail.	ARCH

Client	Trans Date	Atty	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount		Ref #
Client ID 13.59750 LHP Hospital Group, Inc.									
13.59750	06/10/2013	14	A	1	145.00	0.50	72.50	Follow up with Attorney Avondet on Bond and notify of pending Motion to Compel; Letter to Attorney Avondet	ARCH

Client	Trans Date	Atty	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount		Ref #
Client ID 13.59750 LHP Hospital Group, Inc.									
13.59750	06/12/2013	14	A	1	145.00	4.00	580.00	Draft Motion to compel; Draft Affidavit in support of Motion	ARCH
13.59750	06/14/2013	4	A	1	170.00	0.30	51.00	Meet with Bill Hancock on Motion to Compel and on Quail's bond with court.	ARCH
13.59750	06/14/2013	14	A	1	145.00	1.40	203.00	Conference with Attorney Gallafent and Hawkins regarding Motion to compel; Draft Responses to Attorney Avondet on Bond issue; Strategize for remedy request at hearing	ARCH
13.59750	07/08/2013	14	A	1	145.00	1.50	217.50	Prepare for hearing on Motion to Compel; Participate in hearing on Motion to Compel	ARCH
13.59750	07/09/2013	4	A	1	170.00	0.90	153.00	Meet with Bill Hancock on motion to compel and arbitration, finish review of appellant's reply brief, e-mail from court, e-mail to Mike Gaffney, e-mail to client.	ARCH
13.59750	07/30/2013	14	A	1	145.00	0.70	101.50	Telephone conference with Attorney Avondet; Conference with Attorney Gallafent regarding recent developments; Update Attorney Hawkins	ARCH
13.59750	08/01/2013	1	A	21	170.00	0.75	127.50	Summary Judgment brief preparation	ARCH
13.59750	08/01/2013	14	A	1	145.00	2.60	377.00	Work on Motion for Summary Judgment	ARCH

Client	Trans Date	Atty	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount		Ref #
Client ID 13.59750 LHP Hospital Group, Inc.									
13.59750	08/30/2013	1	A	21	170.00	0.10	17.00	Quail Ridge - Conference with Bill on Brief	ARCH
13.59750	08/30/2013	14	A	1	145.00	4.80	696.00	Work on Motion for Summary Judgment - supporting brief	ARCH
13.59750	09/02/2013	1	A	21	170.00	0.50	85.00	Edit Summary Judgment Brief	ARCH
13.59750	09/02/2013	14	A	1	145.00	2.50	362.50	Finish drafting motion for summary judgment	ARCH
13.59750	09/03/2013	14	A	1	145.00	0.80	116.00	Revise Motion for Summary Judgment memo of Authorities; Additional legal research	ARCH
13.59750	09/04/2013	14	A	1	145.00	1.60	232.00	Edit and revise motion for Summary Judgment; Draft additional legal arguments for Motion for Summary Judgment	ARCH
13.59750	09/05/2013	1	A	21	170.00	0.25	42.50	Quail Ridge - Case preparation; e-mail	ARCH
13.59750	09/05/2013	14	A	1	145.00	0.30	43.50	Finalize and file Motion for Summary Judgment and supporting documents	ARCH
13.59750	10/07/2013	14	P	1	145.00	1.30	188.50	Work on opposition to Quail's Cross Motion for Summary Judgment	873
13.59750	10/07/2013	15	P	1	120.00	0.90	108.00	Review memo in opposition to motion for summary judgment; research.	892
13.59750	10/08/2013	14	P	1	145.00	3.60	522.00	Legal research for opposition brief; Research transcripts for opposition brief; Conference with Attorney Hawkins; Revise and edit opposition brief and draft additional arguments; Conference with Attorney	874

Client	Trans Date	Atty	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount		Ref #
Client ID 13.59750 LHP Hospital Group, Inc.									
								Gallafent regarding suggested revision to opposition brief	
13.59750	10/08/2013	1	P	21	170.00	0.75	127.50	Quail Ridge - Edit brief	875
13.59750	10/08/2013	4	P	1	170.00	0.90	153.00	Edit brief in opposition to Quail's motion for summary judgment.	876
13.59750	10/08/2013	15	P	1	120.00	0.20	24.00	Research.	894
13.59750	10/10/2013	14	P	1	145.00	0.40	58.00	Review and analyze opposition to*Motion for Summary Judgement*- 2012 breach of contract action	887
13.59750	10/11/2013	4	P	1	170.00	0.30	51.00	Meet with Bill Hancock on reply brief in our summary judgment motion.	877
13.59750	10/11/2013	14	P	1	145.00	0.20	29.00	Conference with Attorney Hawkins regarding Quail's opposition theories to PMC's*Motion for Summary Judgement*- 2012 breach of contract issue	888
13.59750	10/15/2013	4	P	1	170.00	0.40	68.00	Review and edit reply memo on our motion for summary judgment.	878
13.59750	10/15/2013	14	P	1	145.00	3.70	536.50	Legal research for reply brief; Draft reply brief; Revise and finalize reply brief; File and serve reply brief -2012 breach of contract issue	889
13.59750	10/15/2013	15	P	1	120.00	0.30	36.00	Review and edit reply brief.	897
13.59750	10/21/2013	7	P	1	140.00	0.30	42.00	Conference with Attorney Hancock regarding summary judgment and judgment form	883
13.59750	10/21/2013	14	P	1	145.00	4.50	652.50	Prepare for hearing on*Motion for Summary Judgement*; Hearing on *Motion for Summary Judgement*; Update Attorney Gallafent; Prepare Judgment; Hand deliver judgment to Court - 2012 breach of contract action	891
13.59750	10/22/2013	4	P	1	170.00	0.30	51.00	Meet with Bill Hancock on judgment and collection strategy.	879
13.59750	10/31/2013	1	P	56			103.47	Westlaw research in October, 2013 (Bill Hancock).	59
13.59750	10/31/2013	1	P	56			99.24	Westlaw research in October, 2013 (Tyler Neill).	60



COPY

GROUND LEASE AGREEMENT

Table of Contents

Table of Contents - Page Two

HORENSTEIN, BYANT, FERGUSON & STOLNIKC

GROUND LEASE AGREEMENT

This Ground Lease Agreement is made and entered into this 27 day of January, 1983, by and between INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation, authorized to do business in the State of Idaho under the name of Pocatello Regional Medical Center (hereinafter called "Lessor"), and STERLING DEVELOPMENT CO., a Washington partnership authorized to do business in the State of Idaho, (hereinafter called "Lessee").

R E C I T A L S

WHEREAS, Lessor owns certain real property located within the City of Pocatello, Bannock County, Idaho; and

WHEREAS, Lessor wishes to lease to Lessee approximately 4 acres, more or less, of said property for construction of a Psychiatric Hospital building (the "hospital") and to impose certain restrictions on the use of such parcel of real property and Lessee wishes to lease said parcel of real property for such purpose, subject to Lessor's restrictions; and

WHEREAS, Lessor and Lessee wish to enter into a written ground lease agreement setting forth the terms, conditions and restrictions under which said parcel of real property is to be leased;

NOW, THEREFORE, for and in consideration of the mutual covenants, conditions and promises contained herein, Lessor and Lessee agree as follows:

ARTICLE 1
DESCRIPTION, TERM AND RENTAL

1.1 Real Property Leased. Lessor hereby leases to Lessee and Lessee hereby leases from Lessor the real property described

HORENSTEIN, WYNNE, FERGUSON & STOLNIF
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 300
VANCOUVER, WASHINGTON

in Exhibit "A" attached hereto and hereby made a part hereof, including all easements, right-of-way interests associated therewith whether granted or by prescription, and any and all other interests or rights appurtenant to the property and in adjoining and adjacent land, highways, roads, streets and lanes, whether public or private, which are reasonably required for installation, maintenance, operation and service of electricity, gas, sewer, telephone, water and other utility lines and for driveways and approaches to and from abutting ways for the use and benefit of the above described real property, including improvements to be erected thereon (hereinafter called the "leased land"), situated in the County of Bannock, State of Idaho.

1.2 Term. The term of this Lease shall be for a period of thirty (30) years (hereinafter referred to as the "Term"), commencing on the 1st day of February, 1983, or on or before thirty (30) days after a building permit is issued, whichever is later, (the "Commencement Date"), with one (1) ten (10) year option to extend such term to be exercised as provided in Article 14, Paragraph 14.1, hereof. Such option to extend the term is personal to Lessee and may not be assigned or conveyed in any manner whatsoever to another party. Lessee shall be entitled to possession of the leased land on the Commencement Date.

1.3 Rent and Payment Thereof.

(a) Rental. Lessee shall pay the following annual rental amount:

An initial annual rental shall be calculated on the basis of fifteen percent (15%) of the value of the leased land. For purposes of the first three (3) years from the Commencement Date of this Lease, the leased land shall be valued at the rate of Fifteen

HORENSTEIN, WYNNE, FERGUSON & STOLARIC
ATTORNEYS AT LAW
[illegible]
VANCOUVER, WASHINGTON [illegible]

Thousand and No/100 Dollars ($15,000.00) per acre.

(b) Adjustments Based on Property Value. The annual net rental as set forth above shall be adjusted every three (3) years beginning on the Commencement Date of this Lease, referred to below as the rent adjustment date.

The parties' written agreement within ninety (90) days before the applicable rent adjustment date shall be a conclusive determination between the parties of the fair market value for the period to which the adjustment applies. If the parties have not so agreed by the applicable rent adjustment date, the determination shall be made as in the paragraph on Arbitration in Article 13.

The rent as adjusted shall be equal to fifteen percent (15%) percent of the fair market value of the leased land, exclusive of the improvements on the premises. Determination of fair market value shall be based on the highest and best use of the land on the applicable rent adjustment date without taking the leasehold into account. The determination shall take into account the parties' agreement that the initial minimum rent is the above-stated percentage applied to a fair market value of Fifteen Thousand and No/100 Dollars ($15,000.00) per acre and shall also take into account any determinations of market value made under this lease for the purpose of adjustments for periods preceding the applicable rent adjustment date.

If the determination of adjusted rent is made after the applicable rent adjustment date, lessee shall continue to pay rent at the rate applicable to the preceding period until the adjusted rate is determined. The party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment.

HORENSTEIN WYNNE, FERGUSON & STOUSSE
ATTORNEYS AT LAW
367 of 447
VANCOUVER, WASHINGTON

(c) Definition of Lease Year. A lease year is either a calendar year or a fiscal year, as selected by Lessee.

1.4 Negation of Partnership. Nothing in this Lease shall be construed to render the Lessor in any way or for any purpose a partner, joint venturer, or associate in any relationship with Lessee other than that of landlord and tenant, nor shall this Lease be construed to authorize either to act as agent for the other, except as expressly provided to the contrary in this Lease.

1.5 Place of Rental Payments. All payments of Rental required to be paid to Lessor under the terms of this lease shall be made in lawful money of the United States which at time of such payment shall be legal tender for the payment of public and private debts, free from all claims, demands, deductions, abatements, set-offs, prior notices or counterclaims of any kind or character against Lessor and shall be payable at the following address or at such other place or places as may be from time to time designated by Lessor by written notice given to Lessee:

Pocatello Regional Medical Center
777 Hospital Way
Pocatello, Idaho 83201

1.6 Fee Mortgages. Lessor may grant mortgages, Deeds of Trust or other security interests in the leased land by subordination agreement, provided, however, that such mortgages, Deeds of Trust or security interests shall be subject to this lease and further provided that Lessee deliver a copy of any such proposed mortgage, Deed of Trust or other security interest and related note to Lessor for prior examination and approval; provided, however, that such examination and approval shall be accomplished by Lessor in a diligent manner.

HORNSTEIN, WYNNE, FERGUSON & STOLMB
ATTORNEYS AT LAW
1270 MAIN ST. • SUITE 300
P.O. BOX 1004
VANCOUVER, WASHINGTON 98660
(360) 694-4721

ARTICLE 2

USE OF LEASED LAND AND TITLE TO IMPROVEMENTS

2.1 Use of Leased Land. Lessee shall use the leased land solely for the purpose of constructing, maintaining and operating the hospital for psychiatric care and substance abuse treatment; provided that Lessee may at any time use the leased land for any lawful purpose. Lessee shall commence construction of the hospital within forty-five (45) days after the commencement date of this Lease and the issuance of a building permit. If Lessee is delayed in commencing construction or receiving the permit by any cause or causes beyond Lessee's control, such causes including but not necessarily being limited to Acts of God, strikes, war, insurrections, and the like, said forty-five (45) day period to commence construction shall be extended for a period equivalent to the time lost by reason of any such cause or causes; provided, however, that no extensions shall be granted for any such delay which commences more than ten (10) days before Lessee notifies Lessor of such delay and the reasons therefor. Once construction is begun, Lessee shall, with reasonable diligence, prosecute to completion all construction of improvements, additions, or alterations and shall have substantially completed construction of the hospital within One (1) years after date of this lease. "Substantial completion" shall mean that the hospital is ready for occupancy and use as a hospital as evidenced by a Certificate of Occupancy or other like document issued by an appropriate governmental authority. If Lessee is delayed in substantial completion of the hospital by any cause or causes beyond Lessee's control, such causes including but not necessarily being limited to Acts of God, strikes, war, insurrections, and the like, said date for substantial completion of the hospital shall be extended for a period equivalent to the time lost by reason of any such cause or causes; provided, however, that no extensions will be granted for any such delay

HORENSTEIN, WYNNE, FERGUSON & STOLMAN
[illegible]
[illegible]
[illegible]

which commences more than ten (10) days before Lessee notifies Lessor of such delay and the reasons therefor. All work shall be performed in a good and workmanlike manner, shall substantially comply with plans and specifications submitted to Lessor as required by this lease, and shall comply with all governmental permits, laws, ordinances and regulations. Lessee shall not bring, cause to be brought, or permit to be brought or kept on the leased land anything which will in any way conflict with any law, ordinance, rule, or regulation, or commit or suffer to be committed any waste upon the leased land, or use or allow the leased land or hospital to be used for any immoral or unlawful purpose.

2.2. Architectural Compatibility. It is understood and agreed that the hospital will be architecturally compatible with the Med Center hospital. In order to insure that this be accomplished, Lessee shall submit its site plan, elevations, and architectural plans and specifications for the hospital to the Board of Directors of the Med Center hospital for approval before commencing construction. The approval of the Board of Directors shall not be unreasonably withheld and response shall be given within forty-five (45) days following the submission of Lessee's plans and specifications.

2.3 Required Parking. Lessee agrees that in designing the site plans and the plans and specifications for construction of the hospital, it will include sufficient off-street parking spaces to accommodate the minimum required by local codes.

2.4 Title to Buildings. Title to the hospital and appurtenances thereto and all other improvements and fixtures located on the leased land or constructed or placed on the leased land by Lessee or its tenants shall be and remain in Lessee during the Term. Lessee shall have the right to make alterations, changes and repairs as provided herein. No interest in any buildings, permanent improvements, or fixtures shall pass

HORENSTEIN, WYNNE, FERGUSON & STOLNIK
ATTORNEYS AT LAW
[illegible]
360 of 447

to Lessor until the expiration of the Term or the prior termination of this lease by default of Lessee giving Lessor the right to terminate this lease pursuant to Article 10 hereof. Lessee covenants and agrees that upon expiration of the Term it will yield up and deliver the leased land with any such buildings, permanent improvements, and fixtures upon the leased land at such time free and clear of all liens and encumbrances of any kind, and upon such expiration title therein shall be in Lessor. In the event of earlier termination of this lease, Lessee covenants and agrees that it will yield up and deliver the leased land with any such buildings, permanent improvements, and fixtures upon the leased land at such time free and clear of all liens and indebtedness of any kind. Provided, however, that such obligation to deliver the leased land and improvements free and clear of all liens and indebtedness shall not apply to the original lien of first encumbrance represented by the mortgage or Deed of Trust or other security interest referred to in Article 6 hereof given to secure the financing for the construction of the original buildings, permanent improvements, and fixtures upon the leased land. Upon such earlier termination, title in the buildings, permanent improvements and fixtures upon the leased land shall be in Lessor.

2.5 Deed at Termination. Upon termination of this lease, Lessee shall, subject to the foregoing, execute a deed satisfactory in form and content to Lessor confirming Lessor's title to any buildings, permanent improvements, and fixtures therein, upon the leased land at the time of termination.

2.6 Additional Real Property. At such time as Lessee shall require additional real property for the expansion of the hospital, Lessee shall so notify Lessor and Lessor shall in good faith consider the leasing of additional real property to Lessee for such purpose.

HORENSTEIN, WAGNER, FERGUSON & STOLSHEK
ATTORNEYS AT LAW
1220 MAIN ST • SUITE 300
P.O. BOX 694
VANCOUVER, WASHINGTON 98660 (206) 694-7610

2.7 Grant of Cost of Utilities and Easements. Upon requests being made, Lessor shall grant to public entities or other public service corporations, for the purpose of serving only the property, rights of way or easements on or over the property for poles or conduits or both, for telephone, electricity, water, sanitary or storm sewers or both, and for other utilities and municipal or special district services.

The cost of utilities, their installation and maintenance, are to be assumed, fully paid and satisfied by Lessee.

ARTICLE 3

CONSTRUCTION, ALTERATIONS AND MAINTENANCE

3.1 General Maintenance. Throughout the Term, Lessee shall, at Lessee's sole cost and expense, maintain the premises and all improvements in good condition and repair, ordinary wear and tear excepted, and in accordance with all applicable laws, rules, ordinances, orders and regulations of (1) federal, state, county, municipal, and other governmental agencies and bodies having or claiming jurisdiction and all their respective departments, bureaus, and officials; (2) the insurance underwriting board or insurance companies insuring all or any part of the premises or improvements or both; and (3) Lessor, as shall be in effect from time to time. Lessee shall manage and operate the hospital and the surrounding grounds in a competent and professional manner. Lessee shall maintain the sidewalks and roadways giving access to the hospital free and clear of ice and snow.

Except as provided below, Lessee shall promptly and diligently repair, restore and replace as required to maintain or comply as above, or to remedy all damage to or destruction of all or any part of the improvements resulting wholly or in part from causes required by this lease to be covered by fire or extended coverage insurance, if the cost of the work so required does not

HORENSTEIN WYNNE, FERGUSON & STOUMBO
ATTORNEYS AT LAW
3820060447

exceed seventy-five percent (75%) of the replacement value of all of the improvements. If the cost does exceed that percent, Lessee may nevertheless repair, restore and replace as above or may by notice elect instead to raze the improvements damaged or destroyed. Within thirty (30) days after such notice, Lessor may by notice elect to repair, restore and replace as above, and Lessee shall not raze until the expiration of the time for Lessor's notice of election. Lessor shall not be required to furnish any services or facilities or to make any repairs or alterations of any kind in or on the premises. Lessor's election to perform any obligation of Lessee under this provision on Lessee's failure or refusal to do so shall not constitute a waiver of any right or remedy for Lessee's default, and Lessee shall promptly reimburse, defend, and indemnify Lessor against all liability, loss, cost, and expense arising from it.

In determining whether Lessee has acted promptly as required under the foregoing paragraph, one of the criteria to be considered is the availability of any applicable insurance proceeds.

Nothing in this provision defining the duty of maintenance shall be construed as limiting any right given elsewhere in this lease to alter, modify, demolish, remove, or replace any improvement, or as limiting provisions relating to condemnation or to damage or destruction during the final year or years of the Term. No deprivation, impairment, or limitation on use resulting from any event or work contemplated by this paragraph shall entitle Lessee to any offset, abatement, or reduction in rent nor to any termination or extension of the Term.

3.2 Relief for Substantial Loss of Area. If any damage to or destruction of the premises or the improvements is such that 75% of the floor area is rendered unusable for purposes stated in the Lease, Lessee may, at Lessee's election, delay the work

HORENSTEIN WYNNE, FERGUSON & STOLTZ
ATTORNEYS AT LAW
[illegible] SUITE 500
663-0447
VANCOUVER, WASHINGTON

required above for not to exceed six (6) months. Nothing contained in this paragraph shall be construed to negate or modify any provision of this lease relating to damage or destruction during the final year(s) of the term.

3.3 Major and Minor Distinguished. Lessor's approval is not required for Lessee's minor repairs, alterations, or additions. "Minor" means a construction cost not exceeding Five Thousand and No/100 Dollars ($5,000.00), none of which is derived from funds advanced on the security of an encumbrance on the leasehold or the property. "Construction cost" includes all costs that would constitute the basis of a valid claim or claims under the mechanics' lien laws in effect at the time the work is commenced for any demolition and any removal of existing improvements or parts of improvements as well as for preparation, construction and completion of all new improvements or parts of improvements. The dollar amount stated above shall be adjusted by the percentage change in the index known as the United States Department of Commerce Composite Construction Cost Index as published in the Survey of Current Business by the U.S. Department of Commerce, or successor index. If the index is discontinued and there is no successor index, the reference figure shall be determined by the senior officer in the closest office of the U.S. Department of Commerce or successor department or agency. "Major" repairs, alterations, or additions are those not defined as minor above. For major repairs, alterations, or additions, Lessee shall receive Lessor's approvals of the plans as set forth above in Paragraph 2.2.

3.4 Governmental Authorities. Lessee shall promptly comply with all applicable laws, regulations, ordinances, requirements and orders of governmental authorities, including, but not limited to, the making, at its sole expense, of any installation, alteration, modification, change or repair, structural or otherwise; provided, however, Lessee has the right to contest by

HORENSTEIN, WYNNE, FERGUSON & STOLTZ
ATTORNEYS AT LAW
[illegible]
360 [illegible]427
[illegible]

appropriate judicial or administrative proceedings, without cost or expense to Lessor, the validity or application of any law, ordinance, order, rule, regulations or requirement (hereinafter called "Law") that Lessee repair, maintain, alter or replace the improvements in whole or in part, and Lessee shall not be in default for failing to do such work until a reasonable time following final determination of Lessee's contest. If Lessor gives notice of request, Lessee shall first furnish Lessor a bond, satisfactory to Lessor in form, amount and insurer, guaranteeing compliance by Lessee with the contested law, and indemnifying Lessor against all liability that Lessor may sustain by reason of Lessee's failure or delay in complying with the Law. Lessor may, but is not required to, contest any such Law independently of Lessee. Lessor may, and on Lessee's notice of request shall, join in Lessee's contest.

3.5 Damage or Destruction During Final Years of Term. In the event of substantial damage or destruction to the hospital or any part thereof during the last five (5) years of the Term, Lessor shall have the right, exercisable during the ninety (90) days following the date of such damage or destruction, to terminate this lease. Lessor shall exercise such right by delivering to Lessee written notice of the date of such termination, which date shall not be earlier than thirty (30) days following the date of Lessor's notice of termination. Upon exercise of such right, Lessor shall be entitled to recover the full proceeds of any policy of insurance covering any such damage or destruction except such proceeds as may be attributable to Lessee's loss of personal property and/or to interruption of Lessee's business.

If Lessor does not elect to terminate this lease, Lessee shall be responsible for the repair, rebuilding or replacement of the hospital or any part thereof so damaged or destroyed as the case may be. All such repairs, rebuilding or

HORNSTEIN, WYKOFF, FERGUSON & SIGUMIRE
ATTORNEYS AT LAW
[illegible] ST • SUITE 300
P.O. BOX [illegible]
[illegible] 865-0[illegible]

replacements shall restore the hospital to the condition it was in immediately prior to the event giving rise to the work.

3.6 Last Year of Term. Anything herein to the contrary notwithstanding, Lessee shall not have the right during the last 365 days of the Term to alter, remove or demolish, in whole or in part, any buildings, structures or other improvements which exist upon the leased land 365 days prior to the end of the Term, except with the written consent of Lessor. This provision shall not impair the right of Lessee to remove any moveable items of personal property from the leased land as provided in Article 3 hereof.

ARTICLE 4
LEASEHOLD LIENS

4.1 Right to Grant Lien on Leasehold Estate. So long as Lessee shall not be in default under the terms of this lease, Lessee shall have the right to grant a lien upon or a security interest in its leasehold estate under this lease; provided, however, that notwithstanding any such instrument granting such lien or security interest, Lessor is bound only by those obligations and enjoys all rights and privileges which are set forth in this lease. Any mortgage or Deed of Trust or other security interest executed by Lessee pursuant to this authority is hereinafter designated and referred to as the "leasehold mortgage" and the holder or owner of such leasehold mortgage upon the leasehold estate of Lessee, including the beneficiary of a Deed of Trust, if such mortgage be in the form of a Deed of Trust or other secured party, is hereinafter designated as the "leasehold mortgagee". Any leasehold mortgage shall not be for a period exceeding the Term. Lessor agrees, at any time and from time to time, upon receipt of not less than ten (10) days prior written request therefor by Lessee or by the leasehold mortgagee, to execute, acknowledge and deliver to Lessee or to leasehold

HORNSTEIN WYNNE, FERGUSON & STOUMEN
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]
WACO, TEXAS 76[illegible]
Vol. 0[illegible] 368 of 447

mortgagee a statement in writing, certifying, if such is the case, that this lease is then unmodified and unamended, that it is not in default, and that it is in full force and effect. If there have been modifications and amendments to this lease, said statement shall, if such is the case, certify that the same is not then in default and is in full force and effect as then modified and amended. Said modifications and amendments shall be set forth in full in said statement. Said statement shall further state the dates to which the basic rental or other charges have been paid, and whether or not there is any existing default by Lessee with respect to any covenant, promise of agreement on the part of Lessee provided to be performed under this lease, and also whether a notice of such default has been served by Lessor. If any such statement contains a claim of non-performance, insofar as actually known by Lessor, shall be summarized in said statement. Lessee shall make payment when due and before delinquency of all principal, interest and other charges for which Lessee may be or become obligated under any leasehold mortgage upon the leasehold estate.

4.2 Foreclosure of Lien. Prior to commencing any action to foreclose a leasehold mortgage, the leasehold mortgagee, or any assigns of such mortgage, shall notify Lessor in writing of the default by Lessee with a statement of the amount then due and offer to withhold any acceleration of maturity of the promissory note, payment of which is secured by the leasehold mortgage. In the event Lessor shall, within thirty (30) days of the receipt of said notice, pay to said mortgagee all amounts then in arrears on said mortgage, then upon said payment said mortgagee shall reinstate the mortgage in all respects as if no default had occurred. Lessor may, at its option, make such payments on said mortgage, and the amounts of such payments shall be considered additional rental due Lessor from Lessee under this lease. Subsequent and successive defaults by Lessee in making payments required by any

HORENSTEIN, WYNNE, FERGUSON & STOLTZ
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 300
P.O. BOX 696
VANCOUVER, WA 98660

leasehold mortgage shall be subject to the foregoing provisions each time any such default occurs. Lessee shall insure that all provisions contained in this lease requiring action by parties not a party hereto shall be incorporated into documents to which such parties are a party and that executed copies of such documents be delivered to Lessor within ten (10) days of execution thereof.

ARTICLE 5
PROTECTION OF MORTGAGEE

Lessee shall give notice to Lessor of any leasehold mortage which Lessee grants as provided for in Article 4 hereof and shall deliver along with said notice a copy of the mortgage instrument. So long as any sum remains owing on any obligation secured by such a leasehold mortgage, Lessor and Lessee agree:

(a) That no modification or termination of this lease or surrender of the leased land may be made by the Lessor or Lessee without the prior written consent of the mortgagee;

(b) That the Lessor will give to the mortgagee all notice of default simultaneously with any notice given to the Lessee;

(c) That the mortgagee will have thirty (30) days after notice of default delivered to it within which to cure Lessee's default; provided, however, that said period in which default may be corrected may be extended to no more than ninety (90) days in the event the mortgagee requires such a period as a condition for granting a loan to Lessee and if within forty (40) days after notice of default the mortgagee gives notice to Lessor if it intends to cure Lessee's default within said extended period;

(d) That the Lessor will accept performance by the mortgagee in lieu of performance by the Lessee;

(e) That the Lessor will not terminate the lease for those defaults, the cure of which requires that the mortgagee be in possession provided that the said mortgagee (i) promptly

HORNSTEIN, WYNNE, FERGUSON & STO
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 300
[illegible]

commences foreclosure and continues its action with due diligence, and (ii) continues payment of rent and all other charges required to be paid by Lessee which have accrued and which become due and payable during the period the foreclosure proceeding is pending;

(f) That the Lessor shall not have the right to terminate this lease solely on account of any of the events anticipated by subdivision (d) of paragraph 1 of Article 10 without the written consent of the leasehold mortgagee, provided that such mortgagee promptly commences foreclosure if it has the right to do so and thereafter continues its action with due diligence;

(g) That in the event the Lessee's interest under this lease shall be sold, assigned or otherwise transferred pursuant to the exercise of any right, power or remedy of any mortgagee or pursuant to judicial proceedings or pursuant to paragraph 1 of Article 10, and if no rent or other charges shall then be due an payable under this lease, and if such mortgagee shall have arranged to the reasonable satisfaction of the Lessor for the curing of any default susceptible of being cured, Lessor within sixty (60) days after receiving a written request therefor and upon receiving payment of its expenses, including attorneys' fees, incident thereto, will execute and deliver such instrument or instruments as may be required to confirm such sale, assignment or other transfer of Lessee's interest under the lease; or

(h) That in the event a default under any leasehold mortgage shall have occured, the mortgagee may exercise any right, power or remedy of the mortgagee under the mortgage which is not in conflict with the provisions of the lease.

HORNSTEIN, WYNNE, FERGUSON & STOUMBIS
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 100
P.O. BOX 00
VANCOUVER, WA 98660

ARTICLE 6

SUBORDINATION

6.1 Subordination. The Lessor shall, promptly after the notice of request of Lessee, execute and deliver a mortgage, Deed of Trust or other security instrument (herein called mortgage) sufficient to subordinate, to the lien of a first encumbrance represented by the mortgage, Lessor's fee title (which shall be considered to include fee title in the leased premises or any part or parts of the leased premises, including all rights and appurtenances) to any mortgage lender who is prepared to make a mortgage loan to Lessee to be secured by a first mortgage or Deed of Trust covering said Lessor's fee interest in the demised premises (or such part thereof as may be designated by Lessee) provided that said mortgage is on terms not more onerous than the following:

Principal: Not more than seventy-five percent (75%) of the value of the property to be mortgaged as appraised by any institutional lender proposing to make the loan, or as independently appraised if the lender be other than an institution. An institutional lender is a bank, insurance company, charitable institution, college or other institution of learning, retirement system, welfare fund, or any other organization or institution similar to any of the foregoing. The principal must be self-liquidating by periodic payments over the term of the mortgage;

Maturity: Not more than thirty (30) years or alternatively not more than the period of the unexpired term between the date of the mortgage and the end of the term,

HORENSTEIN, WYNNE FERGUSON & STOUMEN
ATTORNEYS AT LAW
1220 MAIN ST • SUITE 100
P.O. BOX 99
370 of 447

whichever is the shorter. The "term" means the original term herein or exercise of the renewal options herein provided for.

6.2 Expenses. All expenses in connection with the making of said mortgage or Deed of Trust shall be borne by Lessee, and Lessor will execute any and all documents that may be required with respect thereto. However, Lessor shall assume no personal liability for the underlying indebtedness, but the mortgage note or other evidence of indebtedness shall be executed solely by the Lessee. The foregoing provisions of this Article shall extend to any construction mortgage loan applied for by Lessee, as well as any permanent mortgage loan, and any mortgages in substitution or in replacement thereof, and as often as during the term such loans are applied for by the Lessee.

6.3 Non-Mortgage by Lessor. Lessor agrees not to place any mortgage on the premises, or permit the same to be encumbered in any manner, without the prior written consent of the Lessee.

6.4 Limitation on Subordination. Lessor's agreement to subordinate any given portion of the fee title to a first mortgage is limited to one such mortgage on the given portion of the fee title for the purpose of enabling Lessee to obtain financing for the improvements as contemplated herein and located on the given portion of the leased land; provided that, for this purpose, mortgages securing separate construction and take-out or permanent loans for the same work of improvement shall be considered to be one mortgage. Both the note and the mortgage securing it shall expressly provide that there can be no extension of the due date, addition to the balance of the loan, alteration of any provision in the documents, release of any obligor, or any refinancing of the unpaid principal balance without Lessor's prior written approval. Nothing in this paragraph shall prohibit mortgagee from paying delinquent taxes or

HORENSTEIN, WYNNE, FERGUSON & STOUNE
ATTORNEYS AT LAW
1220 MAIN ST. • SUITE 300
37 of 49

assessments or providing insurance coverage if Lessor fails to cure such defaults of Lessee. Lessor shall not be required to subordinate Lessor's fee title to the lien of an encumbrance securing a construction or interim loan except on Lessee's presentation of evidence, delivered as provided for giving notices, of a firm-and-enforceable commitment for a take-out or permanent loan.

6.5 Curing of Defaults. The mortgage shall provide that the mortgagee or trustee may not accelerate the due date of the balance outstanding on any loan by reason of any default by Lessee without having first given Lessor written notice of such default and without having permitted Lessor thirty (30) days in which to cure such default or, if more than thirty (30) days is necessary to cure such default, without having given Lessor adequate time to cure such default. The mortgage and related documents shall further provide that the performance of any and all obligations of Lessee thereunder shall be accepted if tendered by Lessor. Neither Lessor's right to cure any default nor any exercise of such a right shall constitute an assumption of liability under the note or mortgage.

6.6 Indemnification. On request by Lessor, Lessee shall indemnify Lessor from any and all liability and expense caused Lessor as a result of any action of Lessee in connection with the mortgage or Deed of Trust.

ARTICLE 7
INSURANCE

7.1 Liability and Property Damage. From the time when the Lessee commences construction on the demised premises or any part thereof, the Lessee will cause to be written a policy or policies of insurance in the form and contents generally known as public liability and/or owner's, landlord and tenant policies and boiler insurance policies and elevator insurance policies, when there be

HORNSTEIN WYNNE FERGUSON & STOLMAN
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]
[illegible] 872 of 4[illegible]

boilers and elevators included in any improvements located on the demised premises, insuring the Lessee against any and all claims and demands made by any person or persons whomsoever for injuries received in connection with the operation and maintenance of the premises, improvements, and buildings located on the demised premises or for any other risk insured against by such policies, each class of which policies shall have been written within limits of not less than Five Hundred Thousand and No/100 Dollars ($500,000.00) for damages incurred or claimed by any one person for bodily injury, or otherwise, plus One Hundred Thousand and No/100 Dollars ($100,000.00) damages to property, and for not less than One Million and No/100 Dollars ($1,000,000.00) for damages incurred or claimed by more than one person for bodily injury, or otherwise, plus One Hundred Thousand and No/100 Dollars ($100,000.00) damages to property. All such policies shall name the Lessee and the Lessor, as their respective interests may appear, as the persons assured by such policies; and the original or duplicate original of each of such policy or policies shall be delivered by the Lessee to the Lessor promptly upon the writing of such policies, together with adequate evidence of the fact that the premiums are paid.

7.2 Fire and Wind Damage Insurance.

(1) Lessee's Obligation. The Lessee covenants and agrees with Lessor that from and after the time when the lease commences, the Lessee will keep insured any and all buildings and improvements upon the said premises against all loss or damage by fire and windstorm, and what is generally termed in the insurance trade as "extended coverage", which said insurance will be maintained in an amount which will be sufficient to prevent any party in interest from being or becoming a co-insurer on any part of the risk, which amount shall not be less than eighty percent (80%) of the full insurable value, and all of such policies

HORNSTEIN, WAYNE FERGUSON & STOLLMAN
ATTORNEYS AT LAW
P.O. BOX
373 of 447

of insurance shall include the name of the Lessor as one of the parties insured thereby and shall fully protect both the Lessor and the Lessee as their respective interest may appear. In the event of destruction of the said buildings or improvements by fire, windstorm, or other casualty for which insurance shall be payable and as often as such insurance money shall have been paid to the Lessor and the Lessee, said sums so paid shall be deposited in a joint account of the Lessor and the Lessee in a bank located in Bannock County, Idaho, and shall be made available to the Lessee for the construction or repair, as the case may be, of any building or buildings damaged or destroyed by fire, windstorm, or other casualty for which insurance money shall be payable and shall be paid out by the Lessor and the Lessee from said joint account from time to time on the estimate of any reliable architect licensed in the State of Idaho having jurisdiction of such reconstruction and repair, certifying that the amount of such estimate is being applied to the payment of the reconstruction or repair and at a reasonable cost therefor; provided, however, that it first be made to appear to the satisfaction of the Lessor that the total amount of money necessary to provide for the reconstruction or repair of any building or buildings destroyed or injured, as aforesaid, according to the plans adopted therefor, has been provided by the Lessee for such purpose and its application for such purpose assured; and the Lessee covenants and agrees that in the event of the destruction or damage of the buildings and improvements or any part thereof, and as often as any building or improvement on said premises shall be destroyed or damaged by fire, windstorm, or other casualty, the Lessee shall rebuild and repair the same in such manner that the building or improvement so rebuilt and repaired, and the personal

HORNSTEIN WYNNE, FERGUSON & STORMS
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]
[illegible]

property upon the demised premises prior to such damage or destruction, and shall have the same rebuilt and ready for occupancy within fifteen (15) months from the time when the loss or destruction occurred. The fifteen (15) month period for reconstruction shall be enlarged by delays caused without fault or neglect on the part of the Lessee by act of God, strikes, lockouts, or other conditions beyond the Lessee's control.

(2) Delivery of Policies. The originals of all such policies shall be delivered to the Lessor by the Lessee along with the receipted bills evidencing the fact that the premiums therefore are paid; but nothing herein contained shall be construed as prohibiting the Lessee from financing the premiums where the terms of the policies are for three (3) years or more and in such event the receipts shall evidence it to be the fact that the installment premium payment or payments are paid at or before their respective maturities. Where, however, there is a mortgage on the premises created pursuant to the provisions contained in this lease and if, under the terms of such mortgage, it is obligatory upon the Lessee to cause the originals of the policies to be delivered to the mortgagee, then the Lessee shall deliver to the Lessor duplicate certificates of such policies. The policies or duplicate certificates thereof, as the case may be, shall be delivered by the Lessee to the Lessor at least ten (10) days prior to the effective date of the policies.

(3) Effect of Mortgage Subordination. All of the provisions herein contained relative to the disposition of payments from insurance companies are subject to the fact that if any mortgagees holding a mortgage created pursuant to the provisions of this lease hereof elects, in accordance with the terms of such mortgage, to require that the proceeds of

HORNSTEIN, WYNNE, FERGUSON & SIDLOWSKI
ATTORNEYS AT LAW

the insurance be paid to the mortgagee on account of such mortgage, then such payment shall be made, but in such event, it shall still be obligatory upon the Lessee to create the complete fund in the manner set forth in this section to assure and complete the payment for the work of reconstruction and repair.

(4) Damages; Insurance Proceeds; Joint Bank Account. It is agreed that any excess of money received from insurance remaining in the joint bank account after the reconstruction or repair of such building or buildings, if there be no default on the part of the Lessee in the performance of the covenants herein, shall be paid to the Lessee, and in case of the Lessee not entering into the reconstruction or repair of the building or buildings within a period of six (6) months from the date of payment of the loss, after damage or destruction occasioned by fire, windstorm, or other cause for which insurance money shall be payable, and prosecuting the same thereafter with such dispatch as may be necessary to complete the same within fifteen (15) months after the occurrence of such damage or destruction occasioned as aforesaid, then the amount so collected, or the balance thereof remaining in the joint account, as the case may be, shall be paid to the Lessor and it will be at the Lessor's option to terminate the lease and retain such amount as liquidated and agreed upon damages resulting from the failure of the Lessee to promptly, within the time specified, complete such work of reconstruction and repair. The fifteen (15) month period herein provided for reconstruction shall be enlarged by delays caused without fault or neglect on the part of the Lessee by act of God, strikes, lockout, or other conditions (other than matters of finance) beyond the control of Lessee.

HORENSTEIN WYNNE, FERGUSON & HOLDING
ATTORNEYS AT LAW
[illegible]
376-[illegible]

(5) Direct Repayment. The foregoing notwithstanding, in the event the insurance proceeds are the sum of Twenty Five Thousand and No/100 Dollars ($25,000.00) or less, then such proceeds shall be paid directly to the Lessee without the necessity of creating the joint bank account as hereinabove set forth, and Lessee shall use such funds to make the replacements or repairs as required hereunder.

7.3 Lessee's Covenant to Pay Insurance Premiums. The Lessee covenants and agrees with Lessor that the Lessee will pay premiums for all of the insurance policies which the Lessee is obligated to carry under the terms of this lease, and will deliver to the Lessor evidence of such payments before the payment of any such premiums become in default, and the Lessee will cause renewals of expiring policies to be written and the policies or copies thereof, as the lease may require, to be delivered to Lessor at least ten (10) days before the expiration date of such expiring policies.

7.4 Indemnification.

(a) Defense and Payment of Claims. Lessee agrees to defend, indemnify and hold Lessor harmless together with all of its servants, agents, or employees, from and against all liability or loss for injuries to or deaths of persons or damages to property caused by Lessee's acts or omissions to act, use of, or occupancy of the leased land, or as the result of Lessee's operations on said leased land. Each party hereto shall give to the other parties prompt and timely notice of any claim or suit instituted coming to its knowledge which in any way, directly or indirectly, contingently or otherwise, affects or might affect another party, and all parties shall have the right to participate in the defense of the same to the extent of each parties' own interest.

HORENSTEIN WYNNE, FERGUSON & STOLLMAN
ATTORNEYS AT LAW
[illegible]
377 [illegible]

(b) Mechanic's Liens. In the event any mechanic's or other liens or orders for the payment of money shall be filed against the leased land or any building or improvements thereon by reason of or arising out of any labor, material furnished or alleged to have been furnished, or to be furnished to or for Lessee on the leased land, or for or by reason of any change, alteration, or addition of the cost or expense thereof, or any contract relating thereto, or against the Lessor as owner thereof, Lessee shall, within thirty (30) days after it receives notice or knowledge thereof, either pay or bond the same or provide for the discharge thereof in such manner as may be provided by law. Lessee shall also defend on behalf of Lessor at Lessee's sole expense, any action, suit or proceeding which may be brought thereon, or for the enforcement of such liens, or orders, and Lessee shall pay any damage and discharge any judgment entered therein and save harmless Lessor from any and all claims or damages resulting therefrom. Lessor reserves the right, however, to defend or to direct the defense of any such suit or proceedings. Lessee shall pay all expenses of such defense, including attorney's fees, and shall pay any damage and discharge any judgment entered therein and save Lessor harmless from any and all claims or damages resulting therefrom.

(c) Resisting Claims. In the event Lessee shall desire to resist any mechanic's or materialmen's liens, or any other claim against the hereinabove described premises on account of building, rebuilding, repairing, reconstruction or otherwise improving the leased land, Lessee shall have the right to do so, provided Lessee shall first place funds into escrow in an amount sufficient to pay said claim or lien, with said escrow directed to pay such claim or lien in the event of a result adverse to Lessee.

HORENSTEIN WYNNE FERGUSON & STOLMIR
ATTORNEYS AT LAW

7.5 Insurer Qualified. The insurer shall be qualified and authorized through the Department of Insurance of the State of Idaho.

ARTICLE 8

TAXES, ASSESSMENTS, LIENS AND ENCUMBRANCES

Lessee shall be responsible to pay and discharge all existing and future taxes and assessments which are or may become a lien upon or which may be levied by the State, County or any other tax levying body upon the leased land or improvements thereon or property located on the leased land. Lessee shall also be responsible for all insurance premiums, and for all liabilities, charges, fees, obligations, liens and encumbrances associated with or relating to the existence and use of the leased land including, but not limited to, all assessment installments due or payable after the date of this lease. All payments of taxes or assessments or both, except permitted installment payments, shall be prorated for the initial lease year and for the year in which the lease terminates. Lessee may, in its own name, or to the extent necessary under Lessor's name, contest in good faith by all appropriate proceedings, the amount, applicability or validity of any tax, assessment or fine pertaining to the leased land, or to any building, structure or improvement upon the leased land, and in the event Lessee does in good faith contest the applicability or validity of any tax, assessment or fine, Lessor will cooperate in such contest whenever possible with Lessee; provided that such contest will not subject any part of the leased land to forfeiture or loss, except that, if at any time payment of the whole or any part of such tax, assessment or fine shall become necessary in order to prevent any such forfeiture or loss, Lessee shall pay the same or cause the same to be paid in time to prevent such forfeiture or loss.

HORNSTEIN, WYNNE, FERGUSON & STOUSSE

ARTICLE 9

CONDEMNATION

9.1 Priority. In the event of the taking or condemnation by any competent authority for any public or quasi-public use or purpose of the whole or materially all of the demised premises at any time during the term and after any outstanding first mortgage indebtedness has been paid and satisfied, then the rights of Lessor and Lessee to share in the net proceeds of any awards for land, buildings, improvements and damages upon any such taking, shall be as follows and in the following order of priority:

(a) Lessor, at all times, regardless of when the taking occurs, shall be entitled to receive, with interest thereon, that portion of the award as shall represent compensation for the value of the demised premises, considered as vacant and unimproved land, such value being hereinafter referred to as the "land value". Lessor shall also be entitled to costs awarded in the condemnation proceeding proportionately attributable to such land value.

(b) (1) During all the term herein demised, except the last five years of the term, Lessee shall be entitled to the entire balance of the award, which balance is hereinafter referred to as "award balance".

(2) If the taking or condemnation as above set forth shall occur at any time during the last five years of the term, Lessee shall be entitled to receive out of the award, with interest thereon, the award balance, diminished by twenty percent (20%) of such award balance for each full year (and in proportion for a fraction of a year) that elapses from the first day of said five year period to the date of the vesting of title in the condemnor; the remaining award balance and interest thereon, as well as the award for land value and interest thereon, shall belong to the Lessor.

HORNSTEIN, WYNNI, FERGUSON & STOUMBIS
ATTORNEYS AT LAW
[illegible] MAIN ST • SUITE 300
380 [illegible]

(3) For the purpose of computing the last five years of the term within the meaning of subparagraphs (1) and (2) above, it is agreed that said "last five years" shall mean the last five years of the original term, or if, at or prior to the date that the award or the first partial payment thereof (if there be such partial payments) becomes payable, the parties shall have duly agreed to extend the term of this lease pursuant to the options to renew herein contained or by a written instrument executed in the manner required for recording, then said last five years shall be deemed to mean the last five (5) years of the term as so extended.

(c) If the values of the respective interests of Lessor and Lessee shall be determined according to the provisions of subdivisions (a) and (b) of this Section in the proceeding pursuant to which the demised premises shall have been taken or condemned, the values so determined shall be conclusive upon Lessor and Lessee. If such values shall not have been thus separately determined, such values shall be fixed by agreement between the Lessor and Lessee or if they are unable to agree, then the controversy shall be resolved by arbitration under the procedure to govern in Arbitration as set forth in this lease hereof under Article 13.

(d) In the event of the taking in condemnation of less than the whole of the demised premises but materially all of said premises as hereinbelow defined and the part of the premises that remains includes a part of the improvement that was taken, then as to the untaken remainder of the improvement only, but not any remaining land, the parties shall endeavor to agree on the then fair market value of such remainder of the improvement, and if they fail to agree then the controversy shall be resolved by arbitration. The value so agreed upon as the then fair market value of such

HORNSTEIN, WYNNE, FERGUSON & STOUMEN
ATTORNEYS AT LAW
SUITE 300
PITTSBURGH
38-0447

remainder of the improvement or as determined in arbitration, but diminished in the same manner as provided for in "(b)" above relative to an "award balance", shall be paid by Lessor to Lessee, and until paid shall be a charge on the share of the award for land value to which Lessor shall be entitled in the condemnation proceeding.

(e) If title to the whole or materially all of the demised premises shall be taken or condemned, this lease shall cease and terminate as to the provision so taken and shall terminate as to the entire parcel if in Lessee's judgment the taking materially and substantially affects the use and value of the remainder of the demised premises.

ARTICLE 10

DEFAULT PROVISIONS; REMEDIES; ATTORNEY'S FEES

10.1 Default by Lessee. Each of the following shall be deemed an event of default by Lessee and a breach of this lease:

(a) Rent or Other Payments. If Lessee shall default in the payment of rent or other payments hereunder when due according to the terms of this lease and does not fully correct the same within thirty (30) days after written notice thereof to Lessee.

(b) Other Covenants or Conditions. If Lessee shall default in the performance or observance of any other covenant or condition of this lease or of any note, mortgage, Deed of Trust, or other document relating to the financing of the hospital to be performed or observed by Lessee, whether or not Lessor is a party to any such documents, and does not fully correct the same within 30 days after notice thereof to the Lessee.

(c) Abandonment. Abandonment of the premises.

(d) Bankruptcy Proceedings. If during the Term of this lease, Lessee shall:

HORENSTEIN, WYNNE, FERGUSON & STOUMEN
ATTORNEYS AT LAW
3820060447

(i) Appointment of Receiver. Apply for or consent in writing, signed on behalf of Lessee or its duly authorized attorney, to the appointment of a receiver, trustee or liquidator of the Lessee or of all or a substantial part of Lessee's assets; or

(ii) Voluntary Bankruptcy. File a voluntary petition in bankruptcy or admit in writing its inability to pay its debts as they become due; or

(iii) Assignment for Creditors. Make a general assignment for the benefit of creditors; or

(iv) Reorganization or Arrangement. File a reorganization or arrangement with creditors to take advantage of any insolvency law; or

(v) Admit Insolvency. File an answer admitting the material allegations of a petition filed against Lessee in any bankruptcy, reorganization or insolvency proceeding, or during the Term of this lease, an order, judgment or decree shall be entered by any court of competent jurisdiction, on the application of a creditor, adjudicating Lessee bankrupt or insolvent or approving a petition seeking a reorganization of Lessee or appointing a receiver, trustee or liquidator of Lessee, or of all or a substantial part of its assets.

10.2 Remedies. In the event of any breach or default of this lease by Lessee, then Lessor, besides other rights of re-entry may continue professional services to the patients of the hospital and use of the property upon the premises for these purposes.

HORENSTEIN, WYNNE, FERGUSON & STOUMBO
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]
VANCOUVER, WASHINGTON [illegible]

Should Lessor elect to re-enter as herein provided, or should Lessor take possession pursuant to legal proceedings, or pursuant to any notice provided for by law, Lessor may either terminate this lease or Lessor may from time to time, without terminating this lease, relet said premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Lessor in Lessor's sole discretion may deem advisable, with the right to make alterations and repairs to the premises. Rentals received by Lessor from such reletting shall be applied: first, to payment of any indebtedness, other than rent, due Lessor hereunder from Lessee; second, to the payment of rent due and unpaid hereunder; third, to the payment of any costs of such reletting; fourth, to the payment of the cost of any alterations and repairs to the premises made necessary by Lessee's breach of the provisions of this lease; and the residue, if any, shall be held by Lessor and applied in payment of future rent as the same may become due and payable hereunder. Should such rental received from such reletting be less than the rental agreed to be paid that month by Lessee hereunder, then Lessee shall pay such deficiency to Lessor. Such deficiency shall be calculated and paid monthly. No such re-entry or taking possession of the premises by Lessor shall be construed as an election on Lessor's part to terminate this lease unless a written notice of such intention is given to Lessee or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Lessor may at any time thereafter elect to terminate this lease for such previous breach.

Should Lessor at any time terminate this lease for any breach, in addition to any other remedy Lessor may have, Lessor may recover from Lessee all damages Lessor may incur by reason of such breach, including the costs of recovering the premises, and including the worth at the time of such termination of the

HORENSTEIN, WYNN, FERGUSON & SI
ATTORNEYS AT LAW
[illegible]
P.O. BOX [illegible]

excess, if any, of the amount of rent, additional rent and charges equivalent to rent reserved in this lease for the remainder of the Term over the then reasonable rental value of the premises for the remainder of the Term. The remedies herein given to Lessor shall be cumulative, and the exercise of any one remedy by Lessor shall not be to the exclusion of any other remedy. With previous written notice or demand, separate actions may be maintained by Lessor against Lessee from time to time to recover any rent or damages which, at the commencement of any such action, has become due and payable to Lessor without waiting until the end of the Term of this lease.

10.3 Attorney's Fees. In the event suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant herein contained to be kept or performed, the prevailing party shall be paid a reasonable attorney's fee by the other party, and such attorney's fee shall be deemed to have accrued at the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.

ACTICLE 11

COVENANTS AND WARRANTIES

Except as otherwise expressly provided in this lease, lessee agrees to take possession of the leased land in an "as is" condition, provided however, that Lessor covenants, represents and warrants as follows:

11.1 Title. That Lessor has good and marketable title to the leased land and said title is free and unencumbered. Lessor's right, title and interest in and to the leased land, except for this lease and for any lien or indebtedness incurred pursuant to Article 4, shall not be subordinated to any other claim or interest of Lessee or to any other claim or interest of

any mortgagee or other creditor in connection with the financing of the improvements to be constructed on the leased premises.

11.2 Right to Execute. That Lessor has full right and power to execute and perform this lease and to grant the estate leased herein and the rights, easements, privileges, appurtenances and hereditaments belonging or pertaining thereto, including air-rights.

11.3 Peaceful Enjoyment. That Lessee, on paying the rent herein reserved and performing the covenants and provisions hereof on its part to be performed, shall peacefully and quietly have and enjoy the leased land, and all such existing or future required rights, easements, privileges, appurtenances and hereditaments belonging or pertaining thereto, including air-rights, during the Term; provided, however, that Lessor does not warrant that governmental authority may not at some time during the Term, without the consent or permission of Lessor, pass ordinances or perform acts which may be prejudicial to Lessee through no fault of Lessor; provided, however, that Lessor agrees to join with Lessee in protest or opposition to such ordinances or acts, the expenses of such opposition to be borne by Lessee.

ARTICLE 12
ASSIGNMENT, SUBLETTING AND SALE

12.1 Assignment, Subletting and Sale. Lessee may not assign or sublet this lease agreement without the prior written consent of Lessor, which consent shall not be unreasonably withheld; provided, however, that in the event Lessor gives its consent for the assignment or subletting of this lease, Lessor is bound only by such obligations and enjoys such rights and privileges as are set forth in this lease. It is expresssly agreed that Lessor may require, as a condition of such consent, that the officers of the Lessee corporation agree to be person-

HORENSTEIN WINNE, FERGUSON & STOLMAR
ATTORNEYS AT LAW
[illegible]
P O BOX [illegible]

ally liable for the performance of all obligations and covenants of Lessee's assignee(s) or subtenant(s) under this Lease. In the event Lessee shall determine to sell all or any portion of the hospital, and/or any additions or expansions thereto or thereof, Lessor shall be ~~xxxxxxxx~~/ granted first right of refusal to purchase the hospital as the fair market value which, unless agreed upon by the parties, shall be determined by an M.A.I. real estate appraiser appointed and paid by Lessor. If Lessee is not satisfied with the fair market value appraisal submitted by the appraiser selected by Lessor, Lessee may, at its own expense and within twenty (20) days of the receipt of the appraisal, select an M.A.I. real estate appraiser who, together with the appraiser selected by Lessor, shall choose a third such appraiser whose fees shall be shared equally by Lessor and Lessee. If Lessee fails to select a second appraiser within the time allowed, the single appraiser appointed shall be the sole appraiser and shall set the fair market value of the hospital. If Lessee does timely act, and a majority cannot agree as to the fair market value of the hospital, the three (3) appraisals shall be added together and their total divided by three (3). The resulting quotient shall be the fair market value of the hospital for the purpose of this purchase option.

ARTICLE 13

ARBITRATION; APPOINTMENT

13.1 Arbitration. Either party may require the arbitration of any matter arising under or in connection with this lease. Arbitration is initiated and required by giving notice specifying the matter to be arbitrated. If action is already pending on any matter concerning which the notice is given, the notice is ineffective unless given before the expiration of thirty (30) days after service of process on the person giving the notice.

Except as provided to the contrary in these provisions on arbitration, the arbitration shall be in conformity and subject

HORENSTEIN, WYNNE, FERGUSON & STOUMBC
ATTORNEYS AT LAW
1220 MAIN ST., SUITE 300
[illegible]

to applicable rules and procedures of the American Arbitration Association. The arbitrators shall be bound by this lease. Pleadings in any action pending on the same matter shall, if the arbitration is required or consented to, be deemed amended to limit the issues to those contemplated by the rules prescribed above. Each party shall pay half the cost of arbitration including arbitrator's fees. Attorneys' fees shall be awarded as separately provided in this lease.

13.2 Appointment. Appointment shall be made in the manner required for the appointment of arbitrators unless expressly provided to the contrary in the applicable provisions of this lease.

There shall be three (3) arbitrators appointed as follows:

(a) Within twenty (20) days after notice requiring arbitration, each party shall appoint one (1) arbitrator and give notice of the appointment to the other party.

(b) The two (2) arbitrators shall choose a third arbitrator within thirty (30) days after appointment of the second.

(c) If either party fails to appoint an arbitrator, or if the two (2) arbitrators fail to choose a third, the appointment shall be made by the then presiding judge of the Superior Court for the county in which the premises are located, acting in his individual and nonofficial capacity on the application of either party and on (30) days' notice to the other party; provided that either party may, by notice given before commencement of the arbitration hearing, consent to arbitration by the arbitrator appointed by the other party. In that event, no further appointments of arbitrator shall be made and any other arbitrators previously appointed shall be dismissed.

ARTICLE 14

MISCELLANEOUS PROVISIONS

14.1 Exercise of Renewal Option. Lessee may exercise its option to extend the Term granted under Article I, paragraph 1.2, hereof, by giving Lessor written notice thereof not later than 120 days prior to the expiration date of the Term. Any option so exercised shall extend the lease on the same terms as are in effect at the time of the exercise of such options, subject to adjustment and notification in accordance herewith.

14.2 Inspection by Lessor. Lessor may enter upon the leased land at any reasonable time for any purpose necessary, incidental to or connected with verifications of the performance of Lessee's obligations hereunder, but subject to any provisions with respect thereto otherwise contained herein.

14.3 Negation of Partnership. Nothing in this lease shall be construed to render the Lessor in any way or for any purpose a partner, joint venturer, or associate in any relationship with Lessee other than that of landlord and tenant, nor shall this lease be construed to authorize either to act as agent for the other except as expressly provided to the contrary in this lease.

14.4 Controlling Law. This lease shall be deemed to be made and shall be construed in accordance with the laws of the State of Idaho.

14.5 Surrender of Possession. Lessee agrees to yield and deliver to Lessor possession of the demised land at the termination of this lease or as otherwise provided herein, in good condition and in accordance with the express obligations provided herein, except for reasonable wear and tear, and Lessee shall execute and deliver to Lessor a good and sufficient document of relinquishment, if and when requested.

14.6 Successors. This lease shall bind and inure to the benefit of any successor or assignee of Lessor and any successors or assignees of Lessee whether resulting from any merger,

HORNSTEIN, WYNNE, FERGUSON & STOUMBC
ATTORNEYS AT LAW
[illegible]
360 [illegible]
VANCOUVER, WASHINGTON

consolidation, reorganization, assignment, foreclosure or otherwise.

14.7 Headings. The article and paragraph headings contained herein are for convenience and reference and are not intended to define or limit the scope of any provision of this lease.

14.8 Notices. All notices required to be given to Lessee under the terms of the lease shall be given by certified mail, return receipt requested, postage prepaid, addressed to Lessee as follows:

STERLING DEVELOPMENT CO., a
Washington partnership
1906 Broadway
Vancouver, Washington 98663

with copy to:

HORENSTEIN, WYNNE, FERGUSON & STOUMBOS
1220 Main Street, Suite 300
P. O. Box 694
Vancouver, Washington 98666

or at such other addresses as Lessee may designate in writing delivered to Lessor. Similar notice shall be addressed to Lessor as follows:

INTERMOUNTAIN HEALTH CARE, INC.
Suite 2200, 36 South State Street
Salt Lake City, Utah 84111

with copy to:

POCATELLO REGIONAL MEDICAL CENTER
777 Hospital Way
Pocatello, Idaho 83201

Attention: Chris Anton, Administrator

or at such other address as Lessor may designate in writing delivered to Lessee. Notices shall be sent in a similar manner to any mortgagee of Lessee at such address as may be designated in writing.

HORENSTEIN, WYNNE, FERGUSON & STOUMBOS
ATTORNEYS AT LAW
1220 - 390 OF 4471 300
P.O. BOX 694

14.9 Amendment of Lease. Lessor and Lessee shall cooperate and include in this lease by suitable amendment from time to time any provision that may reasonably be requested by any proposed Leasehold Mortgagee for the purpose of implementing the Mortgagee protection provisions contained in this lease and allowing such mortgagee reasonable means to protect or preserve the lien of a Leasehold Mortgage on the occurrence of a default on the terms of this lease. Lessor and Lessee each agree to execute and deliver and to acknowledge if necessary for recording purposes, any agreement necessary to effect such amendment; provided, however, such amendment shall not in any way affect the term or rent under this lease nor otherwise in any respect adversely affect the rights of the Lessor in this lease.

14.10 Recording. Lessor and Lessee agree to execute and have acknowledged, and Lessee agrees to deliver to Lessor, a memorandum of this lease in the form attached hereto as Exhibit "B" for the purpose of recording such memorandum with the County Recorder of Bannock County.

IN WITNESS WHEREOF, the parties have set their hands the day and year first above written.

LESSOR:

INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation authorized to do business in Idaho, dba Pocatello Regional Medical Center

By s/ Chris L. Caston
Administrator

By _____

ATTEST:
Witness
s/ Donald W Olson

HORNSTEIN, WYNN, FERGUSON & STOLWORTH
ATTORNEYS AT LAW
P.O. BOX 447

LESSEE:

STERLING DEVELOPMENT CO., a Washington partnership

By S/
M. L. CANCELOSI

By S/
JOHN R. YUDITSKY

~~ATTEST:~~
Witness:
S/ Denise W Allison

STATE OF Idaho)
: ss.
County of Bannock)

On this 27th day of January, 1983, before me, the undersigned, a Notary Public in and for said State, personally appeared Alvin J. Anton ~~and~~ Vice President
known to me to be the ~~President and Secretary, respectively~~, of INTERMOUNTAIN HEALTH CARE, INC., a Utah non-profit corporation authorized to do business in Idaho, dba Pocatello Regional Medical Center, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

S/
NOTARY PUBLIC in and for the State of Idaho, residing at Pocatello

STATE OF IDAHO)
: ss.
County of Bannock)

On this 27th day of January, 19 83, before me, the undersigned, a Notary Public in and for said State, personally appeared M. L. CANCELOSI and JOHN R. YUDITSKY, known to me to be the General Partners of STERLING DEVELOPMENT CO., a Washington partnership, the partnership that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC in and for the State of Idaho, residing at Pocatello

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 NOV -7 PM 12:59
BY
DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorneys for the Defendants

IN THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
COUNTY OF BANNOCK

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff/Respondent, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants/Appellants.	Case No.: CV-12-5289-OC NOTICE OF APPEAL L4 $109.00 pd

TO: THE ABOVE NAMED RESPONDENT, POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, AND THE PARTY'S ATTORNEYS, KENT L. HAWKINS AND R. WILLIAM HANCOCK, 109 NORTH ARTHUR-5TH FLOOR, P.O. BOX 991, POCATELLO, IDAHO 83204, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants, Quail Ridge Medical Investors, LLC and Forrest L. Preston, appeal against the above named Respondent to the Idaho Supreme Court from the Judgment entered on October 23, 2013.
2. The Appellants have a right to appeal to the Idaho Supreme Court and the Judgment from which this appeal is taken is appealable pursuant to Idaho Appellate Rule 11(a)(1).

3. The issues raised on this appeal are as follows:

    a. Whether the district court erred by entering summary judgment for the plaintiff and by failing to apply the doctrines of res judicata and collateral estoppel to the plaintiff's claims.

4. The Appellants request a standard, hard copy transcript of the hearing held on October 21, 2013.

5. The Appellants request that the following documents be included in the clerk's record in addition to those automatically included under Rule 28 of the Idaho Appellate Rules:

    a. Plaintiff's Motion for Summary Judgment submitted on September 5, 2013;

    b. Brief in Support of Plaintiff's Motion for Summary Judgment submitted on September 5, 2013;

    c. Affidavit of Counsel in Support of Plaintiff's Motion for Summary Judgment submitted on September 5, 2013;

    d. Affidavit of Don Wadle submitted on September 5, 2013;

    e. Defendants' Cross-Motion for Summary Judgment submitted on September 23, 2013;

    f. Defendants' Memorandum in Support of Cross-Motion for Summary Judgment submitted on September 23, 2013;

    g. Affidavit of John M. Avondet in Support of Defendants' Cross-Motion for Summary Judgment submitted on September 23, 2013;

    h. Defendants' Memorandum in Opposition to Motion for Summary Judgment submitted on October 7, 2013;

i. Affidavit of Michael D. Gaffney in Opposition to Plaintiff's Motion for Summary Judgment submitted on October 7, 2013;

j. Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment submitted on October 8, 2013;

k. Defendants' Reply Memorandum in Support of Cross-Motion for Summary Judgment submitted on October 14, 2013;

l. Plaintiff's Reply in Support of its Motion for Summary Judgment submitted on October 15, 2013.

6. I certify:

a. That a copy of this notice of appeal and any request for additional transcript have been served on each reporter of whom an additional transcript has been requested as names below at the address set out on the Certificate of Service;

b. That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript and any additional documents requested in the appeal;

c. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED: November 6, 2013.

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on November 6, 2013, I served a true and correct copy of the NOTICE OF APPEAL on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Stephanie Davis
Court Reporter
624 E. Center
Pocatello, ID 83201

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,	)	
Plaintiff-Respondent,	)	Supreme Court No.
vs.	)	
	)	CLERK'S CERTIFICATE
QUAIL RIDGE MEDICAL INVESTORS, LLC, AND FORREST L. PRESTON, an Individual	)	OF
Defendant-Appellant,	)	APPEAL

Appealed from: Sixth Judicial District, Bannock County

Honorable Judge Robert C. Naftz presiding

Bannock County Case No: CR-2012-5289-OC

Order of Judgment Appealed from: Judgment filed on the 23rd day of October, 2013.

Attorney for Appellant: Michael C. Gaffney and John M. Avondet, Attorneys, BEARD ST. CLAIR GAFFNEY, P.A. Idaho Falls, Idaho

Attorney for Respondent: Dave R. Gallafent and R. William Hancock, Attorneys, MERRILL & MERRILL CHARTERED

Appealed by: Quail Ridge Medical Investors, LLC, and Forrest L. Preston, An individual.

Appealed against: Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC

Notice of Appeal filed: November 7, 2013

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

Name of Reporter: Stephanie Davis

Was District Court Reporter's transcript requested? Yes

Estimated Number of Pages: More than 100

Dated November 8, 2013

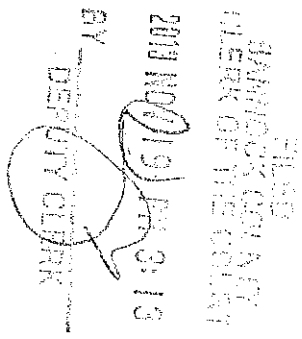
(Seal)

MAGISTRATE DIVISION BANNOCK COUNTY IDAHO DISTRICT COURT

DALE HATCH,
Clerk of the District Court

By _____
Deputy Clerk

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,	Supreme Court No. 41589
Plaintiff,	Case No. CV-2012-5289
vs.	
QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual,	**RESPONDENT'S REQUEST FOR ADDITIONAL RECORDS AND REPORTER'S TRANSCRIPT**
Defendants.	

COMES NOW the Repondent/Plaintiff, Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC ("PMC"), by and through its counsel of record, Merrill & Merrill, Chtd., pursuant to I.R.A.P. 19, and hereby requests the following additional records and reporter's transcript to be included in the clerk's record in the above-referenced appeal:

1. The Respondent requests the following documents to be included in the clerk's record in addition to those documents automatically included under Rule 28 of the Idaho Appellate Rules and in addition to those documents previously requested by the Appellants:
    a. Defendants' Motion for Stay submitted on February 7, 2013;
    b. Affidavit of Counsel in Support of Defendants' Motion for Stay submitted on February 7, 2013;

c. Plaintiff's Objection to Defendants' Motion for Stay or, in the alternative, Request for Bond submitted on February 25, 2013;

d. Affidavit of Counsel in Support of Plaintiff's Objection to Defendants' Motion for Stay, or, in the alternative, Request for Bond submitted February 25, 2013;

e. Affidavit of Don Wadle in Support of Plaintiff's Objection to Defendants' Motion for Stay, or, in the alternative, Request for Bond submitted on February 25, 2013;

f. Defendants' Reply Memorandum in Support of Motion for Stay submitted on March 1, 2013;

g. Plaintiff's Motion to Compel submitted on June 13, 2013;

h. Affidavit of Counsel in Support of Plaintiff's Motion to Compel submitted on June 13, 2013;

i. Defendants' Memorandum in Opposition to Motion to Compel submitted July 1, 2013; and,

j. Minute Entry and Order entered on July 8, 2013.

2. The Respondent requests a standard, hard copy of the reporter's transcript of the hearing held on March 4, 2013.

3. The Respondent requests a standard, hard copy of the reporter's transcript of the hearing held on July 8, 2013.

DATED this 19th day of November, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock, Jr.
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiff in the above-referenced matter does hereby certify that a true, full and correct copy of the foregoing document was this 19th day of November, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[X] Fax: (208) 529-9732

By _____
R. William Hancock, Jr.

2085299732

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 NOV 20 AM 11:27
BY
DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorneys for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289 DEFENDANTS' MOTION TO DISALLOW COSTS AND FEES

The defendants (collectively Quail Ridge), by and through counsel of record Beard St. Clair Gaffney PA, and pursuant to Idaho Rules of Civil Procedure 54(d)(6) and 54(d)(6), respectfully moves this Court for an order disallowing costs and fees sought by plaintiff Pocatello Hospital, LLC dba Portneuf Medical Center, LLC in its *Motion for Costs and Attorney Fees*. The grounds upon which this motion is based are set forth in the memorandum filed contemporaneously herewith.

Oral argument is requested.

DATED: November 20, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on November 20, 2013, I served a true and correct copy of the DEFENDANTS' MOTION TO DISALLOW COSTS AND FEES on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 NOV 20 AM 11:27
BY _____
DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorneys for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289 DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISALLOW COSTS AND FEES

The defendants (collectively Quail Ridge), by and through counsel of record Beard St. Clair Gaffney PA, respectfully submits the following memorandum in opposition to plaintiff Pocatello Hospital, LLC dba Portneuf Medical Center, LLC (PMC)'s Motion for Costs and Attorney Fees.

Because Quail Ridge's defense was not frivolous, unreasonable, or unfounded, the Court should grant Quail Ridge's motion to disallow PMC's costs and fees. In the event the Court decides to award PMC its requested costs and fees, the Court should substantially revise and review the costs and fees requested by PMC. Many of the costs and fees sought by PMC have

not been properly itemized for by PMC and are improper and unreasonable under applicable law. The Court should exercise its discretion and deny those costs.

INTRODUCTION

This action is the second lawsuit between the parties. PMC previously sued Quail Ridge for breach of contract in Bannock County Civil Case No. 10-2724 (*PMC I*). The basis for this action, as well as for *PMC I*, is the parties' Ground Lease Agreement, specifically the rent adjustment provision therein.

In this action, PMC and Quail Ridge each moved for summary judgment on PMC's claims against Quail Ridge, with each side presenting briefing prior to oral argument on October 21, 2013. Upon the Court granting PMC's motion for summary judgment, PMC filed its Motion for Costs and Attorney Fees on November 6, 2013. As outlined below, however, the Court should grant Quail Ridge's motion to disallow costs and fees and deny PMC's motion for costs and fees.

AUTHORITY AND ARGUMENT

I. PMC's requested discretionary costs are not necessary and exceptional.

Idaho Rule of Civil Procedure 54(d)(1) provides that a court may award discretionary costs to a prevailing part "upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." IDAHO R. CIV. P. 54(d)(1)(D) (2013).

PMC is requesting an award of $1,135.18 in discretionary costs stemming from Westlaw legal research. (Pl. Mem. of Costs and Attorney Fees 1-2.) PMC attempts to itemize these research expenses as necessary and exceptional costs. (*Id.* at 1.) However, PMC's online legal research expenses are not necessary and exceptional costs under Rule 54(d), and therefore should

not be considered as discretionary costs for PMC. "[A]s the modern-day equivalent of a law firm's library, it is hard to see how routine online legal research should not simply be one component of a firm's hourly rates." *Beach v. Wells Fargo Bank, NA (In re Beach)*, 2011 Bankr. LEXIS 4027, 28-29 (Bankr. D. Idaho Oct. 19, 2011). The Court should deny PMC's request for its online legal research costs.

II. PMC's requested attorney fees are unreasonable and improper.

Idaho Code § 12-121 allows a court, at its discretion, to award "reasonable attorney's fees to the prevailing party." IDAHO CODE § 12-121 (2013). An award of attorney fees under Idaho Code § 12-121 "is not a matter of right to the prevailing party." *Phillips v. Blazier-Henry*, 2013 Ida. LEXIS 113, *20, 302 P.3d 349, 356 (2013) (quoting *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009)). PMC bases its request for attorney fees on Idaho Code § 12-121, as well as Section 10.3 of the parties' Ground Lease Agreement. (*See* Pl. Mem. of Costs and Attorney Fees 3, Ex. B.) However, because Quail Ridge did not defend its position in this case frivolously, unreasonably, or without foundation, and because PMC's requested attorney fees are not reasonable or proper, the Court should grant Quail Ridge's motion to disallow PMC its requested fees.

An award of attorney fees is only proper under Idaho Code § 12-121 when a court finds "that the case was brought, pursued or defended frivolously, unreasonably or without foundation." IDAHO R. CIV. P. 54(e)(1) (2013). The Idaho Supreme Court recently articulated the factors a court must consider in determining whether to award fees under Idaho Code § 12-121:

> When deciding whether attorney fees should be awarded under I.C. § 12-121, the "entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation."

Phillips, 2013 Ida. LEXIS 113 at *21, 302 P.3d at 356 (quoting *Michalk*, 148 Idaho at 235, 220 P.3d at 591).

Quail Ridge's defense in this matter was not frivolous, unreasonable, or unfounded. Based on its briefing and oral argument regarding the pending appeal in *PMC I*, Quail Ridge was successful in obtaining a conditional stay pursuant to Idaho Rule of Civil Procedure 62(b). (*See* March 6, 2013 Minute Entry and Order.) Quail Ridge's argument for a stay was at least one of its legitimate issues presented during this litigation, and therefore, under *Phillips*, the Court should not award PMC its requested attorney fees.

Should the Court determine PMC is entitled to its attorney fees under the fee provision language in the Ground Lease Agreement, it should exercise its discretion and review PMC's proposed fees. PMC is requesting an award of $15,797.00 in attorney fees. (Pl. Mem. of Costs and Attorney Fees 2.) However, PMC's breakdown of incurred attorney fees, as shown in Exhibit A to PMC's memorandum in support of its motion for costs and fees, does not equal the requested $15,797.00. Instead, the itemized billing statement provided by PMC shows incurred fees of $15,424.00. PMC has failed to properly itemize its requested fees, leading to an unexplained discrepancy in its request for fees.

Further, in its request for fees, PMC has included fees incurred in other actions not associated with this matter. These include fee entries related to time spent working on the appeal in *PMC I* and the 2013 rent adjustment process, as shown by the following entries:

- Included in the 12/04/12 time entry: "Attention to Appeal certification from District Court; Conference with Attorney Gallafent on Cross-Appeal." (Pl. Mem. of Costs and Attorney Fees Ex. A, p. 1.)

- Included in the 12/10/12 time entry: "review clerk's certificate of appeal." (*Id.*)
- Included in the 1/31/13 time entry: "Conference with Attorney Gallafent on Summary Judgment in 2012 case and 2013 Rent Adjustment: Gather documents to begin next step in 2013 rent adjustment." (*Id.*, p. 2.)

These above entries reference legal work from separate matters that are not relevant to this case. Included throughout PMC's billing statement are additional references to "research" or "case preparation" that fail to distinguish for what legal matter the work was performed. The Ground Lease Agreement specifically limits fee awards to reasonable fees incurred at the commencement of an action. (Pl. Mem. of Costs and Attorney Fees Ex. B, p. 31.) PMC is not entitled to fees incurred in the course of unrelated legal work.

For the foregoing reasons, Quail Ridge respectfully requests the Court deny PMC's Motion for Costs and Attorney Fees.

DATED: November 20, 2013

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on November 20, 2013, I served a true and correct copy of the DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISALLOW COSTS AND FEES on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7012

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2013 NOV 27 PM 12:10
BY
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Supreme Court No. 41589 Case No. CV-2012-5289 **AMENDED RESPONDENT'S REQUEST FOR ADDITIONAL RECORDS AND REPORTER'S TRANSCRIPT**

COMES NOW the Respondent/Plaintiff, Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC ("PMC"), by and through its counsel of record, Merrill & Merrill, Chtd., pursuant to I.R.A.P. 19, and hereby requests the following additional records and reporter's transcript to be included in the clerk's record in the above-referenced appeal:

1. The Respondent requests the following documents to be included in the clerk's record in addition to those documents automatically included under Rule 28 of the Idaho Appellate Rules and in addition to those documents previously requested by the Appellants:
    a. Defendants' Motion for Stay submitted on February 7, 2013;
    b. Affidavit of Counsel in Support of Defendants' Motion for Stay submitted on February 7, 2013;
    c. Plaintiff's Objection to Defendants' Motion for Stay or, in the alternative, Request for Bond submitted on February 25, 2013;
    d. Affidavit of Counsel in Support of Plaintiff's Objection to Defendants' Motion for

J. Neff

Stay, or, in the alternative, Request for Bond submitted February 25, 2013;

e. Affidavit of Don Wadle in Support of Plaintiff's Objection to Defendants' Motion for Stay, or, in the alternative, Request for Bond submitted on February 25, 2013;

f. Defendants' Reply Memorandum in Support of Motion for Stay submitted on March 1, 2013;

g. Plaintiff's Motion to Compel submitted on June 13, 2013;

h. Affidavit of Counsel in Support of Plaintiff's Motion to Compel submitted on June 13, 2013;

i. Defendants' Memorandum in Opposition to Motion to Compel submitted July 1, 2013; and,

j. Minute Entry and Order entered on July 8, 2013.

2. The Respondent requests a standard, hard copy of the reporter's transcript of the hearing held on March 4, 2013.

3. The Respondent requests a standard, hard copy of the reporter's transcript of the hearing held on July 8, 2013.

4. I certify that a copy of this request for additional transcript(s) has been served on the Court Reporter of whom a transcript is requested as named below at the address set out below and that the estimated number of additional pages being requested is less than one hundred pages for the reporter's transcript of the hearing held on March 4, 2013, and less than one hundred pages for the reporter's transcript of the hearing held on July 8, 2013.

Stephanie Davis
Court Reporter
Bannock County Courthouse
P.O. Box 4574
Pocatello, Idaho 83205

I further certify that this request for additional records has been served upon the clerk of the district court or administrative agency and upon all parties required to be served pursuant to Rule 20.

DATED this 27th day of November, 2013.

MERRILL & MERRILL, CHTD.

By _____
for R. William Hancock, Jr.
Attorneys for the Plaintiff/ Respondent

2014 JAN -8 P 1:27

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	**Case No. CV-2012-5289** **ORDER REGARDING ATTORNEY FEES**

NATURE OF THE ACTION

This matter comes before this Court pursuant to a Motion for Costs and Attorney Fees filed by the plaintiff, Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC ("PMC"). The motion is a result of this Court's decision granting PMC's Motion for Summary Judgment and the subsequent Judgment. This Court heard oral arguments regarding this matter on December 16, 2013.

DISCUSSION

The Plaintiff is basing its request for costs and fees on Idaho Rule of Civil Procedure 54 and Idaho Code § 12-121, as well as this Court's granting of summary judgment in favor of PMC and entry of the corresponding Judgment. With regard to its request for attorney fees, the Plaintiff additionally asserts it "is specifically entitled to an award of attorney fees … as a matter

of contractual right under Section 10.3" of the parties' 1983 Ground Lease Agreement. (*See* Pl.'s Mot. for Costs and Attorney Fees, Nov. 6, 2013, 1.)

1. ATTORNEY FEES

Rule 54(e)(1)[1] of the Idaho Rules of Civil Procedure (IRCP) provides a court with the discretion to award reasonable attorney fees to the prevailing party when authorized by statute or contract. However, IRCP 54(e) also limits an award of attorney fees pursuant to Idaho Code ("IC") § 12-121[2]. Attorney fees may be awarded under that section of the Idaho Code only when the court is left with the abiding belief the case was "brought, pursued or defended frivolously, unreasonably or without foundation . . . ." IDAHO R. CIV. P. 54(e)(1) (2012). "An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003)(citing *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 20 P.3d 702 (2001)). A trial court's award of attorney fees under the statute is reviewed under an abuse-of-discretion standard. *Madsen*, 142 Idaho at 639, 132 P.3d at 396. However, even in cases where "the losing party has asserted

[1] **Rule 54(e)(1). Attorney fees.** In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

[2] **§ 12-121. Attorney fees.** -- In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

factual or legal claims that are frivolous, unreasonable, or without foundation", as long as "there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded" under IC § 12-121. *Id.* (internal citations omitted); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502, 517 (2007). Furthermore, attorney fees may not be awarded under IC § 12-121 unless the losing party's entire case is frivolous, unreasonable, or without foundation.

> When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001).

Vendelin v. Costco Wholesale, Corp., 140 Idaho 416, 434, 95 P.3d 34, 52 (2007).

As explained, the Plaintiff asserts it is "specifically entitled to an award of attorney fees ... as a matter of contractual right under Section 10.3" of the parties' 1983 Ground Lease Agreement.[3] That section of the contract provides for the payment of reasonable attorney fees in the event an action is brought for the recovery of any rent due or because of the breach of any other covenant. The Defendant counters that attorney fees are not appropriate because this case was not brought, pursued or defended frivolously, unreasonably or without foundation.

---

[3] **Section 10.3 Attorney's Fees:**
In the event suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant herein contained to be kept or performed, the prevailing party shall be paid a reasonable attorney's fee by the other party, and such attorney's fee shall be deemed to have accrued at the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.

PMC is the prevailing party in this case. This Court ruled in favor of the Plaintiff on the motion for summary judgment and entered judgment to that effect, finding that the Defendant had clearly breached the ground lease by failing to promptly pay the adjusted rent as required. Judgment to that effect was entered, with the Defendant being ordered by this Court to pay the unpaid rent, plus interest. Thus, the Plaintiff is entitled to an award of attorney fees pursuant to the parties' Ground Lease agreement, as set forth previously. Furthermore, this Court has determined the Defendant mounted an unreasonable defense in this case, as the motion for summary judgment and entry of the Judgment was necessitated by the Defendant's failure to comply with the order of the district court to "promptly" pay the rent due and owing under the parties' Ground Lease Agreement. Therefore, this Court hereby grants the Plaintiff's request for an award of attorney fees. Having thoroughly reviewed the Plaintiff's Motion for Costs and Attorney's Fees and the supporting memorandum and affidavit, as well as taking into careful consideration the Defendant's objections and the oral arguments presented at the hearing, this Court hereby awards the Plaintiff the sum of **$15,599.75** in attorney fees. This Court reduced the Plaintiff's request for fees by $197.25.

2. COSTS

IRCP 54(d)(1)(c) allows a court to award costs to a prevailing party in its discretion. As a matter of right, the prevailing party is entitled to costs related to filing fees, service fees, witness fees, travel expenses of witnesses, expenses for certified copies, costs for preparation of map, models, photographs or other exhibits, cost of bond premiums, expert witness fees, costs of

reporting and transcribing a deposition, and costs for a copy of a deposition.[4] This Court has determined the Plaintiff is the prevailing party, and, as such, is entitled to costs as matter of right pursuant to IRCP 54(d)(1)(C). After reviewing the Plaintiff's Memorandum of Costs and Attorney Fees, this Court has determined the Plaintiff is entitled to **$96.00** in costs as a matter of right for the filing fee.

The Plaintiff has also claimed discretionary costs for Westlaw research incurred in bringing the Motion for Summary Judgment and in defending the Defendant's Cross-Motion for

---

[4] Rule 54(d)(1). Costs - Items allowed.
(A) Parties Entitled to Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.
...
(C) Costs as a Matter of Right. When costs are awarded to a party, such party shall be entitled to the following costs, actually paid, as a matter of right:
1. Court filing fees.
2. Actual fees for service of any pleading or document in the action whether served by a public officer or other person.
3. Witness fees of $20.00 per day for each day in which a witness, other than a party or expert, testifies at a deposition or in the trial of an action.
4. Travel expenses of witnesses who travel by private transportation, other than a party, who testify in the trial of an action, computed at the rate of $.30 per mile, one way, from the place of residence, whether it be within or without the state of Idaho; travel expenses of witnesses who travel other than by private transportation, other than a party, computed as the actual travel expenses of the witness not to exceed $.30 per mile, one way, from the place of residence of the witness, whether it be within or without the state of Idaho.
5. Expenses or charges of certified copies of documents admitted as evidence in a hearing or the trial of an action.
6. Reasonable costs of the preparation of models, maps, pictures, photographs, or other exhibits admitted in evidence as exhibits in a hearing or trial of an action, but not to exceed the sum of $500 for all of such exhibits of each party.
7. Cost of all bond premiums.
8. Reasonable expert witness fees for an expert who testifies at a deposition or at a trial of an action not to exceed the sum of $2,000 for each expert witness for all appearances.
9. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action.
10. Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action.

Summary Judgment. The right to discretionary costs is governed by IRCP 54(d)(1)(D).[5] "Discretionary costs are additional items of cost not enumerated in Rule 54(d)(1), and can include such items as long distance telephone calls, photocopying, faxes, travel expenses and postage." *Auto. Club Ins. Co. v. Jackson*, 124 Idaho 874, 880, 865 P.2d 965, 971 (1993). While the awarding of such costs is discretionary as explained previously, "the burden is on the prevailing party to make an adequate initial showing that these costs were necessary and exceptional and reasonably incurred, and should in the interests of justice be assessed against the adverse party. *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 926, 821 P.2d 973, 981 (1991)." *Id.* Furthermore, "Rule 54(d)(1)(D) also provides that the trial court shall make express findings as to why each discretionary cost item should or should not be allowed." *Id.* However, "[e]xpress findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interests of justice is sufficient to comply with this requirement." *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (internal citation omitted); *see also*, *Fish v. Smith*, 131 Idaho 492, 494, 960 P.2d 175, 177 (1998)(affirming trial court's denial of discretionary costs for expert witness fees despite the fact that the court did not evaluate each cost item by item).

---

[5] **(D) Discretionary Costs.** Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

The Plaintiff asserts the claimed research costs "were necessary and exceptional costs reasonably incurred" in this case. After reviewing the Plaintiff's memorandum and considering the arguments in opposition presented by the Defendant, this Court has determined the research costs associated with this matter were a necessary and reasonable part of this case. This Court has also determined these were exceptional costs reasonably incurred. As such, the Plaintiff is also entitled to **$1,135.18** in discretionary costs.

CONCLUSION

Based on the preceding discussion and Section 10.3 of the 1983 Ground Lease Agreement entered between the parties, the Plaintiff's Motion for Costs and Attorney Fees is GRANTED. The Plaintiff is entitled to an award of costs and attorney fees in the total sum of **$16,830.93**.

DATED this 7 day of January, 2014.

Robert C. Naftz

ROBERT C. NAFTZ
District Judge

Copies to:

R. William Hancock
Michael D. Gaffney

BANNOCK CTY
2014 JAN -8 AM 10:27
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an Individual, Defendants.	**Case No. CV-2012-5289-OC** **FINAL JUDGMENT**

Based on the decision entered by this Court, it is hereby ORDERED and ADJUDGED that Plaintiff is awarded judgment in the amount of $416,812.50 plus interest of $45,221.30 for a total of $462,033.80. Plaintiff is also awarded attorney fees and costs in the amount of $16, 830.93.

IT IS SO ORDERED.

DATED this 7 day of January, 2014

Robert C. Naftz

ROBERT C. NAFTZ
DISTRICT JUDGE

Copies to:

R. William Hancock (Attorney for Plaintiff)
Michael D. Gaffney (Attorney for Defendants)

FILED
BANNOCK COUNTY
CLERK
2014 JAN -8 AM 10:27
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an Individual, Defendants.	**Case No. CV-2012-5289-OC** **FINAL JUDGMENT**

Based on the decision entered by this Court, it is hereby ORDERED and ADJUDGED that Plaintiff is awarded judgment in the amount of $416,812.50 plus interest of $45,221.30 for a total of $462,033.80. Plaintiff is also awarded attorney fees and costs in the amount of $16, 830.93.

IT IS SO ORDERED.

DATED this 7 day of January, 2014

Robert C. Naftz

ROBERT C. NAFTZ
DISTRICT JUDGE

Copies to:

R. William Hancock (Attorney for Plaintiff)
Michael D. Gaffney (Attorney for Defendants)

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2014 FEB 21 PM 12: 31
BY
DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorneys for the Defendants

IN THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
COUNTY OF BANNOCK

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff/Respondent, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants/Appellants.	Case No.: CV-12-5289-OC STIPULATION RE: RECORD ON APPEAL

The parties through counsel of record hereby stipulate and agree that the attached documents are true and correct copies of the Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment, submitted on October 8, 2013, and Defendant's Reply Memorandum in Support of Cross-Motion for Summary Judgment, submitted on October 14, 2013.

The parties further stipulate and agree that the Record on Appeal be augmented to include these documents as they were submitted to the Court on the dates identified in the Certificates of Service contained in each respective document.

Dated: February 20, 2014

Michael D. Gaffney
John M. Avondet
OF Beard St. Clair Gaffney PA
Attorneys for the Defendants/Appellants

Dated: February 20th, 2014

Kent L. Hawkins
R. William Hancock
Merrill & Merrill, Chartered
Attorneys for the Plaintiff/Respondent

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on February 20, 2014, I served a true and correct copy of the STIPULATION RE: RECORD ON APPEAL on the following by the method of delivery designated below:

Bannock County Courthouse
624 E. Center
Pocatello, ID 83201
Fax: (208) 236-7013

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

Dave R. Gallafent (ISB # 1745)
Kent L. Hawkins (ISB # 3791)
R. William Hancock (ISB # 7938)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, an individual, Defendants.	Case No. CV-2012-5289 **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to I.R.C.P. 56(c), the Plaintiff submits the following as its Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment:

INTRODUCTION

Although the parties do not dispute that this case arises from the failure of Quail Ridge Medical Investors ("Quail Ridge") to pay Pocatello Hospital, LLC d/b/a Portneuf Medical Center, LLC ("PMC") adjusted rents for the 2010 rent adjustment period, the parties certainly dispute when and how the present breach of contract action arose.

Quail Ridge asserts that the present breach of contract action arose when PMC filed its Verified Complaint in Bannock County Case No. CV-20102724-OC – the action which Quail Ridge identifies in its Cross-Motion for Summary Judgment as *PMC I* – seeking, among other things, to declare the adjusted rents for the 2010 rent adjustment period.

Although PMC did raise a breach of contract claim as part of its claims in *PMC I*, the court, without opposition from PMC, dismissed such claim for the reason that such claim was not ripe for determination by the Court. Indeed, Judge Brown had already opined from the bench in *PMC I* that a breach of contract claim could not be ripe until *after* the court determined the amount of rent due under the lease and the tenant failed to promptly pay the rents as adjusted by the court.

Thus, while it is undisputed that these same parties have litigated the issue of adjusted rents for the 2010 rent adjustment period, it is also abundantly clear that this present breach of contract claim was not ripe for litigation until *after* the court in *PMC I* declared what adjusted rents were due and owing for the 2010 rent adjustment period and the tenant, Quail Ridge, thereafter failed to pay the rents as adjusted by the court. Because this breach of contract claim was not ripe for adjudication in *PMC I*, it is not barred by the doctrine of res judicata in the present action. As will be discussed more thoroughly below, the Idaho Supreme Court has long recognized that ripeness is an exception to the doctrine of res judicata.

RELEVANT MATERIAL FACTS

While Quail Ridge made reference to the Order on Form of Judgment entered by Judge Brown in *PMC I*, Quail Ridge failed to cite this Court to the relevant portion of that order which succinctly clarifies the legal and factual basis for the present action. In that Order, Judge Brown states the following concerning the consequences of Quail Ridge's failure to promptly pay the adjusted rents for the 2010 rent adjustment period:

> The parties' Ground Lease Agreement provides that 'the party indebted shall, promptly after the determination, pay any difference for the period affected by the adjustment." Ground Lease Agreement, p. 3, § 1.3(b). Now that the determination has been made as contemplated under the Ground Lease Agreement, the Ground Lease Agreement requires "prompt" payment of the balance due under the Ground Lease Agreement. Although the Ground Lease Agreement does not define the term prompt for purposes of the parties' agreement, **a failure to pay this amount in a reasonable certainty would give rise to an action for breach of contract**.

(Avondet Aff., Ex. F, at p. 3) (emphasis added).

There can be no confusion from the above cited language that Judge Brown clearly understood that Quail Ridge's failure to promptly pay the adjusted rents declared by him as due and owing for the 2010 rent adjustment period "would give rise to an action for breach of contract." Further, it is clear within the context of this language that such breach of contract

action would be separate and distinct from the action tried before Judge Brown in *PMC I* because the factual basis for such action could not arise until after the rents had been declared in that action and the tenant, Quail Ridge, thereafter failed to promptly pay the rents as adjusted by the court. In short, Judge Brown made it absolutely clear that his role was to declare the adjusted rent due for the 2010 rent adjustment period, which he did, and that the tenant, Quail Ridge, would thereafter be obligated to promptly pay such adjusted rents. Judge Brown made it further abundantly clear that should Quail Ridge fail to promptly pay the rent as adjusted by the court, then "a failure to pay this amount in a reasonable certainty would give rise to an action for breach of contract."

Because it is undisputed in this case that Quail Ridge and its personal guarantor, Forrest Preston, have not paid the outstanding adjusted rents for the 2010 rent adjustment period (Wadle Aff.) declared by Judge Brown as due and owing, it is also clear that this breach of contract action is now ripe for adjudication and, as will be discussed more thoroughly below, is not barred by the doctrine of res judicata.

ARGUMENT

Plaintiff will spare this Court a long recitation of the doctrine of res judicata. Indeed, Plaintiff has previously briefed this doctrine in its Motion for Summary Judgment. If, however, the Court wishes a more detailed review of this doctrine and the progression of its application and limitations by the Idaho Supreme Court, then Plaintiff refers the Court to the opinion rendered by the Idaho Court of Appeals in *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (Idaho App. 1983) (limited in part by *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 804 P.2d 319 (1990)).

For purposes of this discussion, it is important for this Court to understand that the Idaho Supreme Court has long recognized two situations where the doctrine of res judicata does not apply: (1) in cases where mandamus and damages are sought as alternative or cumulative forms of relief; and (2) in cases where matters raised in the second action were not ripe for adjudication in the prior action. *See Aldape*, 668 P.2d at 149 (citations omitted). In the present case, the second exception applies and, therefore, the doctrine of res judicata does not bar the action.

Indeed, as has been demonstrated by the plain language of Judge Brown's Order on Form of Judgment, even Judge Brown appreciated the fact that if Quail Ridge were to fail to promptly pay the adjusted rents for the 2010 rent adjustment period based upon his declaration of such rents, then a breach of contract action would arise from such failure. The fact that this action would not

arise until *after* Quail Ridge had failed to promptly pay such adjusted rents clearly demonstrates that this action could not arise at the time that *PMC I* was being litigated before the court. Thus, the present action was not ripe for litigation in *PMC I*.

Notably, in *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 663 P.2d 287 (1983), the Idaho Supreme Court recognized that there can be circumstances when facts occur subsequent to a first trial that trigger the filing of a second suit and that the issue raised in the second suit was not ripe for adjudication in the first case, but rather was premature until after a determination had been made in the first suit. *Duthie*, 104 Idaho at 754, 663 P.2d at 290. Such is the present case before this court. In this case, the complained of breach of contract could not arise until after Quail Ridge and Forrest Preston had failed to promptly pay the adjusted rents for the 2010 rent adjustment period as declared by the court in *PMC I* as due and owing for the 2010 rent adjustment period. Indeed, neither Defendant had a contractual duty to pay such rents until after Judge Brown had declared the rents due and owing for the 2010 rent adjustment period. Therefore, similar to the issue before the Idaho Supreme Court in *Duthie*, the facts giving rise to this second suit could not have occurred until after the first determination had been made in the prior action.

Because the present action is based upon new and distinct breaches of contract by these respective Defendants, the Plaintiff respectfully requests this Court to deny the Defendants' Cross-Motion for Summary Judgment. This Court should find that this present action was not ripe during *PMC I* and, therefore, the Plaintiff's claims are not barred by the doctrine of res judicata against either Defendant. Plaintiff respectfully requests the Court to grant it any such further relief the Court deems appropriate under the circumstances of this case including, but not limited to, attorneys' fees associated with defending this Cross-Motion for Summary Judgment.

DATED this 8th day of October, 2013.

MERRILL & MERRILL, CHTD.

By _____
R. William Hancock
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiff in the above-referenced matter does hereby certify that a true, full and correct copy of the foregoing document was this 8th day of ~~September~~ October, 2013, served upon the following in the manner indicated below:

Michael D. Gaffney
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, Idaho 83404

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Mail
[X] Fax: (208) 529-9732

Honorable Robert E. Naftz
624 E. Center, Rm. 220
Pocatello, Idaho 83201
(Chambers Copy)

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[X] Fax: (208) 236-7290

R. William Hancock, Jr.

Merrill & Merrill
P.O. Box 991
Pocatello, Idaho 83204-0991
(208) 232-2286
Fax: (208) 232-2499

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 208-236-7012

Number of pages including this cover sheet: 6

To: Bannock County District Court

From: R. William Hancock/ Deborah

Client/Matter: **PMC v Quail Ridge; CV-2012-5289-OC; Acceptance of Service**

Date: October 8, 2013

COMMENTS:

Following this fax cover sheet for filing please find the *Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment* regarding the above noted case. Please contact our office with any questions, thank you.

Deborah Lafana
Legal Assistant

cc: Gaffney (208-529-9732)
Honorable Robert E. Naftz Chambers (208-236-7290)

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.
IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (208) 232-2286.

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorneys for the Defendants

In the Sixth Judicial District of the State of Idaho, County of Bannock

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants.	Case No.: CV-12-5289-OC Defendants' Reply Memorandum in Support of Cross-Motion for Summary Judgment

The defendants (collectively Quail Ridge), through counsel of record Beard St. Clair Gaffney PA, respectfully submit the following reply memorandum in support of Quail Ridge's Cross-Motion for Summary Judgment, filed September 23, 2013. This memorandum is supported by Quail Ridge's memorandum in opposition to the motion for summary judgment filed by the plaintiff, Pocatello Hospital, LLC dba Portneuf Medical Center, LLC (PMC); the second affidavit of John Avondet, counsel for Quail Ridge; and other pleadings and affidavits in the record.

INTRODUCTION

PMC's breach of contract claim against Quail Ridge is the second such claim brought by PMC arising from the parties' Ground Lease agreement. As explained in Quail Ridge's memorandum in support of its cross-motion for summary judgment, res judicata and collateral estoppel should preclude PMC's present breach of contract action against Quail Ridge. In arguing otherwise, PMC relies on criticized case law that is factually inapposite to the present litigation while simultaneously ignoring PMC's procedural posture in *PMC I*. For the reasons set forth below, this Court should grant Quail Ridge's cross-motion for summary judgment.

STATEMENT OF FACTS

Quail Ridge references and incorporates its Statement of Facts contained in its cross-motion for summary judgment as if set forth fully herein. (*See generally* Defs.' Mem. Re: Defs.' Cross-Mot. Summ. J. at 3-6.)[1]

ARGUMENT

In its memorandum in opposition to Quail Ridge's cross-motion for summary judgment, PMC argues that its present breach of contract claim against Quail Ridge, arising out of the parties' Ground Lease Agreement, was not ripe for adjudication at the time of *PMC I*, and therefore res judicata does not preclude PMC from pursuing its current breach of contract claim against Quail Ridge. However, PMC's ripeness argument hinges on questionable and factually distinct case law while ignoring what occurred at trial in *PMC I*.

In arguing that its current breach of contract claim against Quail Ridge was not ripe at the time of *PMC I*, PMC relies on *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 663 P.2d 287

[1] Submitted on September 23, 2013.

(1983). The facts underlying *Duthie*, however, are distinct from this litigation, and *Duthie* has been soundly criticized in subsequent Idaho case law.

Duthie was the second litigation between the parties over the plaintiff Duthies' right to connect their residence to the defendant Gun Club's domestic water line. *Id.*, 104 Idaho at 752, 663 P.2d at 288. The Gun Club initially sued the Duthies for trespass, construction costs, and maintenance fees; the first trial court determined that a valid license existed and granted the Duthies' motion to dismiss with prejudice. *Id.*, 105 Idaho at 752-53, 663 P.2d at 288-89. Almost two years after the conclusion of the first case, the Gun Club cut the Duthies' waterline, after which the Duthies brought the second action against the Gun Club, arguing that res judicata precluded the Gun Club from claiming that the Duthies' license was revoked in the second litigation. *Id.*, 105 Idaho at 753, 663 P.2d at 289.

In finding that res judicata did not bar the Gun Club's argument that the Duthies' license was revoked, the *Duthie* court cited res judicata precedent, including the following language from *Intermountain Food Equip. Co. v. Waller*:

> "We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit."

Duthie, 104 Idaho at 753, 663 P.3d at 289 (quoting *Intermountain Food Equip.*, 86 Idaho 94, 98, 383 P.2d 612, 615 (1963) (internal citations omitted)). The *Duthie* court then determined that "because facts occurred subsequent to the first trial that triggered the filing of the second suit, we hold that the issue of revocability was not ripe for trial in the first case, but rather, was premature until the license was actually revoked." This decision was constantly criticized by Justice Bistline, who wrote a scathing dissent in *Duthie* and subsequent case law:

> Today's opinion is surely the epitome of appellate ambivalence, arming the Court with opposing lines of precedent which serve the purpose of finding justification for whatever appellate result is desired. Today's opinion is result oriented; the Court's entire rationale for an incomprehensible result, wholly at odds with all notions of *res judicata*...

Id., 104 Idaho at 754, 663 P.2d at 290 (Bistline, J., dissenting).

> The [*Duthie*] Court was then faced with the task of "discovery the correct theory." In doing so, it had to work around its own concession that the law of *res judicata* was firmly entrenched by prior Idaho cases, none of which were in the least equivocal.

Walker v. Shoshone Co., 112 Idaho 991, 998, 739 P.2d 290, 297 (1987) (Bistline, J., concurring).

> The doctrine of *res judicata* is still alive in Idaho although it suffered serious injury at the hands of this Court in *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 663 P.2d 287 (1983). In that case a majority of this Court, over the protest of a strong dissent, emasculated what had been until then one of the most strictly adhered to principles of Idaho jurisprudence by declaring that the doctrine of *res judicata* need not be applied where the circumstances were not "ripe," *i.e.*, that after a judgment became wholly final, a second suit involving the same issues previously litigated could nevertheless be brought, provided that there was the interjection into the second law suit of some additional fact not present in the first.
>
> Here is Paul Harvey, again, with the rest of the story: After the *Duthie* case ending in a final judgment decreeing Duthie entitled to take and use water from a Gun Club supply line, and after all time for appeal had expired, the Gun Club severed the line to Duthie's residence. That was the "new fact."
>
> It would be a kindness to the trial bench and bar if two more votes were forthcoming to erase any precedential effect which may otherwise some day be accorded it.

Olsen v. Olsen, 115 Idaho 105, 108, 765 P.2d 130, 133 (1988) (Bistline, J., concurring, n. 1). As evidenced by this language from Justice Bistline, the *Duthie* decision is not without its faults in addressing the applicability of res judicata.

Duthie's obvious problems aside, it is also factually inapposite to the case currently before the Court. In *Duthie*, the parties' first litigation concerned the Gun Club's claims of trespass by the homeowners tapping into the Gun Club's water line. Almost two years after the first case concluded, the parties were again embroiled in litigation, this time to determine if the

homeowners' license to tap the water line was revoked. The facts, claims, and timing of these two cases are far removed from each other in comparison to *PMC I* and the parties' current litigation.

Unlike the claims in *Duthie*, PMC's breach of contract claims against Quail Ridge in *PMC I* and the present litigation constitute the same grievance: PMC's allegation that Quail Ridge breached the parties' Ground Lease Agreement. After the conclusion of *PMC I* in the trial court, PMC was quick to again sue Quail Ridge for allegedly breaching the Ground Lease Agreement, with the present lawsuit coming mere months after Judge Brown's decision in *PMC I.* The proximity and similarities between PMC's breach of contract claims against Quail Ridge suggest that PMC's present breach of contract claim against Quail Ridge was indeed ripe for adjudication in *PMC I*, and should therefore be precluded by res judicata.

In arguing that its current breach of contract action against Quail Ridge was not ripe in *PMC I*, PMC argues that "Judge Brown had already opined from the bench in *PMC I* that a breach of contract claim could not be ripe until *after* the court determined the amount of rent due under the lease and the tenant failed to promptly pay the rents as adjusted by the court." (Pl.'s Mem. Re: Defs.' Cross-Mot. Summ. J. 2 (emphasis in original).) However, this statement ignores Judge Brown's language from the bench after PMC's case-in-chief and upon Quail Ridge's motion for a directed verdict on PMC's first breach of contract claim:

> I would agree with Mr. Gaffney that the evidence that was introduced yesterday was deficient in establishing that there has been a breach of contract associated with this matter.

(Avondet Aff. Ex. E; *PMC I* Trial Tran. Vol. II, 86:25-87:3, May 15, 2012.)

PMC presented its case-in-chief, including its breach of contract claim against Quail Ridge, in *PMC I.* "[T]he former adjudication concludes parties and privies not only as to *every*

matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit." *Duthie*, 104 Idaho at 753, 663 P.2d at 289 (quoting *Intermountain Food Equipment Co. v. Waller*, 86 Idaho 94, 98, 383 P.2d 612, 615 (1963) (internal citations omitted)). PMC made its choice – it elected to bring its claim for breach of contract against Quail Ridge in *PMC I*. In presenting its case-in-chief, including its breach of contract claim against Quail Ridge prior to dismissal of the breach claim, PMC offered the matter of its claim for breach of contract by Quail Ridge. PMC should be made to face the ramifications of its procedural strategy. This Court should find that res judicata therefore precludes PMC from again asserting its breach of contract claim against Quail Ridge in this litigation.

CONCLUSION

Based on the foregoing and previous pleadings and affidavits before the Court, Quail Ridge respectfully requests the Court grant its cross-motion for summary judgment.

DATED: October 14, 2013.

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for the Defendants

CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on October 14, 2013, I served a true and correct copy of the DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Bannock County Courthouse 624 E. Center Pocatello, ID 83201 Fax: (208) 236-7012	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile
Dave R. Gallafent R. William Hancock Merrill & Merrill PO Box 991 Pocatello, ID 83204 Fax: (208) 232-2499	☐ U.S. Mail	☐ Hand-delivered	☑ Facsimile

Michael D. Gaffney
John M. Avondet
Of Beard St. Clair Gaffney PA
Attorneys for Defendants

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2014 FEB 21 PM 4:07
BY
DEPUTY CLERK

Michael D. Gaffney, ISB No. 3558
John M. Avondet, ISB No. 7438
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: gaffney@beardstclair.com
javondet@beardstclair.com

Attorneys for the Defendants

IN THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
COUNTY OF BANNOCK

Pocatello Hospital, LLC dba Portneuf Medical Center, LLC, Plaintiff/Respondent, vs. Quail Ridge Medical Investors, LLC, and Forrest L. Preston, Defendants/Appellants.	Case No.: CV-12-5289-OC ORDER RE: RECORD ON APPEAL

This matter having come before the Court by means of the Stipulation Re: Record on Appeal executed by the parties, and good cause having been shown,

IT IS HEREBY ORDERED that the Record on Appeal be augmented to include the Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment, submitted on October 8, 2013, and Defendant's Reply Memorandum in Support of Cross-Motion for Summary Judgment, submitted on October 14, 2013.

Dated: February 21, 2014

Robert C. Naftz
Honorable Robert C. Naftz

CLERK'S CERTIFICATE OF MAILING

I certify that on February 24, 2014, I served a true and correct copy of the ORDER RE: RECORD ON APPEAL on the following by the method of delivery designated below:

Michael D. Gaffney
John M. Avondet
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, ID 83404
Fax: (208) 529-9732

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Dave R. Gallafent
R. William Hancock
Merrill & Merrill
PO Box 991
Pocatello, ID 83204
Fax: (208) 232-2499

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

/s/
Clerk of the Court

By: MD
Deputy Clerk

RECEIVED
SUPREME COURT
2013 NOV 13 A 9:03

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC, Plaintiff-Respondent, vs. QUAIL RIDGE MEDICAL INVESTORS, LLC, AND FORREST L. PRESTON, an Individual Defendant-Appellant,	Supreme Court No. 41589 CLERK'S CERTIFICATE OF APPEAL

Appealed from: Sixth Judicial District, Bannock County

Honorable Judge Robert C. Naftz presiding

Bannock County Case No: CV-2012-5289-OC

Order of Judgment Appealed from: Judgment filed on the 23rd day of October, 2013.

Attorney for Appellant: Michael C. Gaffney and John M. Avondet, Attorneys, BEARD ST. CLAIR GAFFNEY, P.A. Idaho Falls, Idaho

Attorney for Respondent: Dave R. Gallafent and R. William Hancock, Attorneys, MERRILL & MERRILL CHARTERED

Appealed by: Quail Ridge Medical Investors, LLC, and Forrest L. Preston, An individual.

Appealed against: Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC

Notice of Appeal filed: November 7, 2013

Notice of Cross-Appeal filed: No

FILED - ORIGINAL
NOV 13 2013
Supreme Court Court of Appeals
Entered on ATS by

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

Name of Reporter: Stephanie Davis

Was District Court Reporter's transcript requested? Yes

Estimated Number of Pages: More than 100

Dated November 8, 2013

(Seal)

MAGISTRATE DIVISION BANNOCK COUNTY IDAHO DISTRICT COURT

DALE HATCH,
Clerk of the District Court

By _____
Deputy Clerk

LODGED at the Bannock County Courthouse in Pocatello, Idaho, this 21 day of January, 2014, _____ o'clock ____.m.

MAGISTRATE DIVISION BANNOCK COUNTY IDAHO DISTRICT COURT

ROBERT POLEKI
Clerk of the Court

By _____
Deputy

STEPHANIE DAVIS (208) 236-7247

IN THE SUPREME COURT OF THE STATE OF IDAHO

POCATELLO HOSPITAL, LLC, dba PORTNEUF MEDICAL CENTER, LLC, Plaintiff/ Respondent,	)	Supreme Court
vs.	)	No. 41589
QUAIL RIDGE MEDICAL INVESTORS, LLC, and FORREST L. PRESTON, Defendants/ Appellants.	)	

REPORTER'S TRANSCRIPT ON APPEAL
VOLUME ONE OF ONE
PAGES 1 THROUGH 48

Appeal from the District Court
of the Sixth Judicial District of the
State of Idaho, in and for the County of Bannock,
HONORABLE ROBERT C. NAFTZ,
District Judge, presiding.

--o0o--

ORIGINAL

APPEARANCES:

For the Plaintiff/ Respondent:
MERRILL & MERRILL
Attorneys at Law
R. WILLIAM HANCOCK
PO Box 991
Pocatello, Idaho 83204

For the Defendant/ Appellant:
BEARD ST. CLAIR GAFFNEY
Attorneys at Law
JOHN M. AVONDET
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,	)	
Plaintiff-Respondent,	)	Supreme Court No. 41589
v.	)	
	)	CLERK'S CERTIFICATE
QUAIL RIDGE MEDICAL INVESTORS, LLC, AND FORREST L. PRESTON, an Individual	)	
Defendants-Appellants,	)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true, full, and correct record of the pleadings and documents as are automatically required under Rule 28 of the Idaho appellate Rules.

I do further certify that there were no exhibits marked for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 25 day of February 2014.

(Seal)

ROBERT POLEKI,
Clerk of the District Court
Bannock County, Idaho Supreme Court

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

POCATELLO HOSPITAL, LLC d/b/a PORTNEUF MEDICAL CENTER, LLC,	)	
Plaintiff-Respondent,	)	Supreme Court No. 41589
v.	)	
	)	CERTIFICATE OF SERVICE
QUAIL RIDGE MEDICAL INVESTORS, LLC, AND FORREST L. PRESTON, an Individual	)	
Defendants-Appellants,	)	

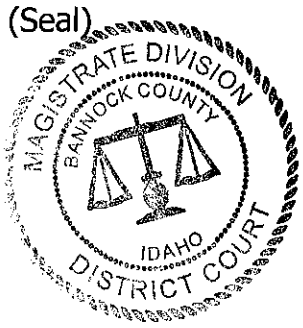
I, ROBERT POLEKI, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that I have personally served or mailed, by United States mail, one copy of the REPORTER'S TRANSCRIPT and CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

Michael D. Gaffney
John M. Avondet
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

Dave R. Gallafent
R. William Hancock
Post Office Box 991
Pocatello, Idaho 83204-0991

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this _____ day of , 2014.

(Seal)



ROBERT POLEKI,
Clerk of the District Court
Bannock County, Idaho Supreme Court

By _____
Deputy Clerk

CERTIFICATE OF SERVICE